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IN THE

Supreme Court of the United States

October Term, 1949

No. 44

HEMAN MARION SWEATT,
Petitioner,

vs.

THEOPHILUS SHICKEL PAINTER, *ET AL.*

BRIEF FOR PETITIONER.

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BRIEF FOR PETITIONER.

Opinions Below.

The Texas Court of Civil Appeals remanded this cause without prejudice, then affirmed the judgment of the court below and finally denied petitioner's motion for rehearing. These decisions are set out in the record at pages 434-435, at pages 445-460, and at pages 460-461 respectively. The only reported opinion can be found in 210 S. W. 2d 442. The opinion of the Supreme Court of Texas denying application for writ of error and overruling the motion for rehearing may be found at pages 466, and 471 of the record. They are not reported.

Jurisdiction.

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257, this being a case involving rights secured under the Fourteenth Amendment to the Constitution of the United States. Petitioner commenced this action in the state courts of Texas on May 16, 1946. The District Court of Travis County, Texas denied his petition for writ of mandamus on June 17, 1947 (R. 438-440). The Texas Court of Civil Appeals affirmed this judgment on February 25, 1948 (R. 445-460, 465),[1] and the Supreme Court of Texas refused application for writ of error on September 29, 1948 (R. 466). At each and every stage of this proceeding, petitioner has raised and maintained his basic contention that unless he is admitted to the University of Texas, which Texas maintains for whites, he is denied the equal protection of the laws required under the Fourteenth Amendment.

Statement of the Case.

On May 16, 1946, petitioner filed in the 126th District Court of Travis County, Texas, a petition for a writ of mandamus seeking his admission to the University of Texas School of Law from which he had been excluded solely because of race and color (R. 403-408). On June 17, 1946, a hearing was held, and on June 26 the District Court entered judgment declaring the state's refusal to admit petitioner to the University of Texas School of Law constituted a denial of the equal protection of the laws since

[1] There were three hearings in the lower court and two arguments before the Court of Civil Appeals. These details are explained *infra* under Statement of the Case. Referred to here are the final hearings only in these two tribunals.

this institution is the only one within the state which provides legal training. The court, however, refused to grant the writ at that time and gave respondents six months to provide a course of legal instruction "substantially equivalent" to that which was provided at the University of Texas and retained jurisdiction of the cause during that period (R. 424-426).

On December 17, 1946, a second hearing was held, and the court entered final judgment dismissing the petition on the ground that the state had made available another law school providing legal training "substantially equivalent" to that offered at the University of Texas and, therefore, had complied with its order of June 26. This judgment was entered although the record clearly shows that no such law school had been established for petitioner and other Negroes. The state had only promised to furnish separate legal educational facilities in the future (R. 426-432).

On March 26, 1947, the Court of Civil Appeals set aside the judgment of the trial court without prejudice and remanded the cause for further proceedings (R. 434-435). On May 12-18, 1947, a trial on the merits was held in the lower court. On June 17, 1947, judgment was entered for respondents, and the petition for writ of mandamus was dismissed (R. 438-440). This decision the Court of Civil Appeals affirmed on February 25, 1948. Its opinion appears on pages 445-460 of the record.

Motion for rehearing was denied on March 17, 1948 (R. 460), with opinion (R. 460-461). The opinion is reported in 210 S. W. 2d 442.

On September 8, 1948, the Supreme Court of Texas denied application for writ of error, without opinion

(R. 466) and on October 27, 1948, a motion for rehearing was overruled (R. 471). They are not officially reported.

Thereupon petitioner brought the cause here, and his petition for writ of certiorari was granted on November 7, 1949 (R. 473).

Statement of Facts.

Over four years ago, petitioner duly filed an application for admission to the University of Texas School of Law. He possessed all the qualifications necessary for admission. It is conceded that his being a Negro was the sole reason for respondents' refusal to admit him. When the May 16th and December 17th, 1946 hearings were held, the only state-supported law school in existence was the law school at the University of Texas which was maintained exclusively for whites. Thus from the time petitioner made application to the University of Texas on February 26, 1946, through the May 16th and December 17th hearings, respondents refused to admit him to the only existing state facility, although they had made no other provision for his education. Yet their defense was that they were required to furnish petitioner "separate but equal" facilities.

While the first appeal was pending in the Court of Civil Appeals, a separate law school for Negroes was established to which petitioner on March 20, 1947, was invited to attend (R. 175). It has been petitioner's contention all along that the state has no authority to exclude him from the University of Texas School of Law merely because of his race and color, and that this separate Negro institution was not and could not be the equivalent of the law school of the University of Texas.

Errors Relied Upon.

I.

The Texas Court was in error in holding that the "separate but equal" doctrine did not violate petitioner's right to equal protection of the laws guaranteed by the Fourteenth Amendment to the Federal Constitution.

II.

The Texas Court was in error in holding that the law school established for Negroes at Austin was "substantially equal" to the law school which the state makes available to non-Negroes at the University of Texas.

III.

The Texas Court was in error in holding that the respondents were not required under the Fourteenth Amendment to the Federal Constitution to admit petitioner to the school of law of the University of Texas on the same basis as it admits qualified non-Negro applicants.

IV.

The Texas Court was in error in refusing to admit evidence showing that in its application the "separate but equal" doctrine inevitably results in the Negro facility being inferior and hence that the doctrine results in discrimination based upon race and color in violation of the Federal Constitution.

Summary of Argument.

Petitioner contends that the Court should reverse the judgment of the court below on the grounds that the equal protection clause of the Fourteenth Amendment, as properly construed, is not conducive to an interpretation which would permit the State to exclude him from the University of Texas School of Law solely because of his race and color.

The equal protection clause has both a broad and a specific purpose which may be described as follows: First, it was broadly intended to insure that all persons similarly situated would be treated alike in their relationships with the state. Second, it was specifically meant to prohibit any state from denying to Negroes, as such, any rights, privileges or advantages which it offers or makes available to white persons.

The first purpose has been interpreted as an interdiction against arbitrary governmental action, and hence any classification or distinction which a state makes can be justified only when it relates to some real difference having pertinence to a legitimate legislative objective. The second purpose has been interpreted as embodying a fundamental hostility to racial distinctions and classifications, and as incorporating into the fundamental law the democratic credo that governmental action based upon race and blood are necessarily arbitrary. Petitioner contends that respondents' refusal to admit him to the University of Texas School of Law, solely because of his race, while admitting white persons as a matter of course, defeats both of these purposes, and hence subjects him to a violation of constitutional rights.

Respondents' attempt to justify their conduct is in the nature of confession and avoidance. They admit that their

refusal to allow petitioner to enter the University of Texas School of Law is because of his race. They contend, however, that such conduct has been cured of unconstitutionality because he may now secure legal training at a Negro law school "substantially equivalent" to that being offered at the University of Texas. In support of their position, they rely chiefly on *Plessy* v. *Ferguson*, 163 U. S. 537.

Petitioner maintains that *Plessy* v. *Ferguson* is not applicable to this case. Whatever view may be taken as to the correctness of the *Plessy* doctrine, this Court has never applied that doctrine to education. Petitioner submits that the very purpose which education is designed to achieve in a democratic society is at war with the imposition of the arbitrary standards inherent in racial segregation. Petitioner further maintains that the application of the "separate but equal" formula inevitably results in racial discrimination. In every instance those facilities which the state has set aside for Negroes as "separate but equal", measured by any conceivable standard, have been graphically inferior in nature to schools available to all other persons. The record discloses that this case is no exception.

This Court has long recognized that the Constitution is given contour and meaning only to the degree that its provisions are properly applied to existing fact. An assumption of equality under the doctrine of the *Plessy* case nullifies the basic intendment of the equal protection clause when, as here, such equality is belied by actuality. This doctrine, therefore, is not a valid precedent for determining the constitutionality of respondents' acts.

If the Court should believe otherwise, petitioner submits that the fallacious doctrine of *Plessy* v. *Ferguson* must be reexamined. Such reexamination will reveal that this doctrine inevitably results in the application of unequal and

discriminatory standards by the state in its relations with Negroes, as contrasted with the standards employed in its relations with white persons. This is a denial of equal protection of the laws. Petitioner submits, therefore, that the Court should issue a mandate requiring respondents to admit him to the University of Texas School of Law on a non-discriminatory basis, and that *Plessy* v. *Ferguson* should be overruled.

ARGUMENT.

I.

The State of Texas is forbidden by the equal protection clause of the Fourteenth Amendment to the United States Constitution to deny petitioner's admission to the University of Texas solely because of considerations of race and color.

Petitioner has been refused admission to the University of Texas because he is a Negro. Respondents defend this refusal on the ground that state constitutional and statutory law requires Negroes and non-Negroes to be educated in separate schools, and that such racial segregation in the state's educational system is permitted by decisions of this Court. Petitioner contends that refusal to admit him to the University of Texas solely on the basis of his race or color is in violation of the equal protection clause of the Fourteenth Amendment because: (1) differences in race afford no rational foundation for differences in treatment, and the equal protection clause permits only such differences in treatment which accord with judicial concepts of reasonableness; (2) such differences in treatment violate all notions of reasonableness when used to determine the availability of public educational institutions on the law school

level; and (3) in any event, under the equal protection clause a governmental classification based upon race or color is unconstitutional *per se*.

A. In making admission to the University of Texas School of Law dependent upon applicant's race or color, Texas has adopted a classification wholly lacking in any rational foundation. Therefore, it is invalid under the equal protection clause.

Under Texas law, only whites, or more accurately all racial or color groups other than Negroes, may attend the University of Texas School of Law. Negroes must secure whatever legal educational opportunities Texas offers to them at a separate institution. Even if we assume, *arguendo*, that there are circumstances in which a state has the power to make race or color the basis of a legislative classification (a proposition which we reject in its entirety), nevertheless, we submit, that the difference in treatment, of which petitioner here complains, is one which bears no rational relationship to any valid legislative end, and hence constitutes that form of differential treatment which contravenes the equal protection clause.

The basic purpose and intent of the equal protection clause of the Fourteenth Amendment was to prohibit a state from denying its Negro citizens any right it gave or offered its white citizens. *Strauder* v. *West Virginia*, 100 U. S. 303. A secondary purpose was to insure that all persons similarly situated would receive like treatment and that no special groups or classes should be singled out for favorable or discriminatory treatment. *Southern Railway Co.* v. *Greene*, 216 U. S. 400; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Maxwell* v. *Bugbee*, 250 U. S. 525.

It will be observed that the secondary purpose is broader in scope than the first, since it is not primarily concerned

with racial distinctions but with arbitrary distinctions of any kind. To determine if state legislation subserves that secondary purpose, this Court does not prohibit all but only certain types of legislative distinctions. This adjustment has been necessary because the requirements of equal protection pose a relatively difficult problem. Classification by definition implies the imposition of duties and burdens upon a special class, different from that to which the general public is subject. *Metropolitan Casualty Insurance Co.* v. *Brownell*, 294 U. S. 580; *Puget Sound Power & Light Co.* v. *Seattle*, 291 U. S. 619; *Board of Tax Commissioners* v. *Jackson*, 283 U. S. 527; *Patsone* v. *Pennsylvania*, 232 U. S. 138; *Clark* v. *Kansas City*, 176 U. S. 114.[2]

An interpretation of the equal protection clause, however, as wholly depriving the states of this power, would seriously threaten the orderly administration of government.[3] Yet, if the states are not carefully limited as to the classifications they may make, the equal protection clause would become meaningless. Therefore, the Court when dealing with this type of legislation has devised the following test: If a classification is to conform to the constitutional mandate of equal protection, it must be based upon some real or substantial difference which has pertinence to a valid legislative objective, *e. g.*, *Dominion Hotel* v. *Arizona*, 249 U. S. 265; *Maxwell* v. *Bugbee*, *supra*; *Continental Baking Co.* v. *Woodring*, 286 U. S. 352; *Great Atlantic & Pacific*

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[2] See also: Tussman & ten Broek, *The Equal Protection of the Laws*, 37 Calif. L. Rev. 341 (1949) for a scholarly analysis of the treatment of the equal protection clause by this Court.

[3] "* * * * the machinery of government would not work if it were not allowed a little play in its joints." Mr. Justice Holmes, *Bain Peanut Co.* v. *Pinson*, 282 U. S. 499, 501.

Tea Co. v. *Grosjean*, 301 U. S. 412; *Queenside Hills Co.* v. *Saxl*, 328 U. S. 80; *Groessart* v. *Cleary*, 335 U. S. 464.[4]

On the other hand where alleged differences on which the classification rests do not in fact exist, or cannot be reasonably or rationally related to the legislative end, the classification violates the constitutional requirement of equal protection, *e. g.*, *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389; *Southern R. Co.* v. *Greene*, *supra*; *Truax* v. *Raich*, 239 U. S. 33; *Smith* v. *Cahoon*, 283 U. S. 553; *Mayflower Farms* v. *Ten Eyck*, 297 U. S. 266; *Skinner* v. *Oklahoma*, 316 U. S. 535. The above formula has been consistently followed by this Court without deviation since the adoption of the Fourteenth Amendment, as the most effective method of giving life and substance to the mandate of equal protection, while at the same time permitting the state freedom to deal with the everyday problems of government.[5]

In this case, Texas uses the dissimilarity of race and color between Negroes and non-Negroes as the basis for determining eligibility to attend the University of Texas. There are, in effect, two systems of education—one for Negroes and one for non-Negroes. If we are to test the constitutionality of this classification by the applicable standards of this Court, we must first discover and examine the objective the state is attempting to accomplish in providing educational advantages for its citizenry through the graduate and professional school levels, and then determine what relevance, if any, race and skin pigmentation may have to such purposes.

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[4] See: *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78, for an excellent analysis of Court's approach to a classification problem.

[5] Of course there has been considerable disagreement on the Court as to whether these principles were being properly or appropriately applied. See *e. g.* Mr. Justice RUTLEDGE's dissent in *Kotch* v. *Board of River Port Pilot Commissioners*, 330 U. S. 552, 565, but the formula itself has never been questioned.

1. *There is no valid basis for the justification of racial segregation in the field of education. Enforced racial segregation aborts and frustrates the basic purposes and objectives of public education in a democratic society.*

In our search of cases and literature on the subject, both legal and otherwise, the only bases that we have been able to find on which states have attempted to justify laws which require the segregation of races in educational facilities are: (1) That racial segregation in some way aids in the accomplishment of the objectives which a state is attempting to bring about in setting up a system of public education; (2) that segregation laws are necessary to preserve public peace and good order; and (3) that races are of unequal ability to participate in the educational process and therefore separate treatment is required. We submit that there is no rational connection between racial differences and any valid legislative objective which a state may attempt to promote in providing public education. In this area, therefore, identical treatment of the races is mandatory.

a. Our way of life is founded on a system which places reason above coercion.[6] *Lovell* v. *Griffin*, 303 U. S. 444; *Schneider* v. *State*, 308 U. S. 147; *Hague* v. *C. I. O.*, 307 U. S. 496. Mr. Justice BRANDEIS, in a concurring opinion in *Whitney* v. *California*, 274 U. S. 357, 375 said:

> "Those who won our independence believed that the final end of the State was to make men free to develop their faculties; that in its government the deliberative forces should prevail over the arbitrary."

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[6] For a discussion of the national interest in elimination of racial discrimination and of the differences between ours and a totalitarian system see: Lusky, *Minority Rights and the Public Interest*, 52 Yale L. J. 1 (1942).

We have come to realize that democratic processes can only operate effectively where there is an alert and enlightened citizenry. In order to make certain that our citizens are equipped to make rational decisions and thus maintain and preserve our democratic institutions, it is vital that their individual skills and values, as well as a pragmatic belief in the basic tenets of democracy, be developed through the medium of education. This function of education has become so important that it is no longer left solely in the hands of the parents or philanthropists.[7] It is one of the highest functions of state government. In order that Americans may develop their intellectual capacities and ethical principles to the fullest, and thus participate most effectively in the responsibility and duties of citizenship, all the forty-eight states have uniformly undertaken to provide educational benefits at a minimum cost to the individual citizen.

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[7] As stated in 47 Am. Jur., Schools, Section 6, page 299, at common law, the parent's control over his child extended to the acquisition of an education. The parent's common law rights and duties in this regard "have been generally supplemented by constitutional and statutory provisions, and it is now recognized *that education is a function of the government.*" (Italics ours.)

There is another important reason for the trend towards public rather than private education, particularly at the university level. The cost of maintaining a large university at a high standard has become so prohibitive that some of our oldest and best private institutions are in grave financial straits which, unless alleviated, might necessitate their closing down. See: Address of Dr. Seymour of Yale University to alumni on February 5, 1950, as reported in N. Y. TIMES, February 6, 1950, page 27, and in the N. Y. HERALD TRIBUNE, February 6, 1950, on page 3.

Dr. Alonzo F. Myers, Chairman of the New York University Department of Higher Education, at the annual luncheon of the Tuition Plan held in New York City on February 16, 1950, stated that higher education must be expanded to meet growing needs. He felt, however, that this expansion must occur largely in publicly supported institutions and stressed the grave financial crisis of 500 small private colleges. N. Y. TIMES, February 17, 1950, page 1.

b. If it be a basic principle of our American credo that education is a necessary function of democracy, then it follows logically that education must be made available to *all* citizens. Horace Mann, one of the most illustrious names in the history of American pedagogy, said:[8]

> "Education must be universal * * * The theory of our government is—not that all men, however unfit, shall be voters—but that every man, by the power of reason and the sense of duty, shall become fit to be a voter. Education must bring the practice as nearly as possible to the theory. As the children now are, so will the sovereigns soon be. How can we expect the fabric of the government to stand, if vicious materials are daily wrought into its framework. Education must prepare our citizens to become municipal officers, intelligent jurors, honest witnesses, legislators, or competent judges of legislation—in fine, to fill all the manifold relations of life. For this end, it must be universal."

Mortimer J. Adler, professor of law at the University of Chicago, stated the same proposition in these terms:[9]

> "Liberal education is developed only when a curriculum can be devised which is the same for all men, and should be given to all men, because it consists

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[8] Morgan, *Horace Mann—His Ideas and Ideals*, 98 (1936).

[9] Education for Freedom, a Series of Radio Lectures sponsored and published by the Education for Freedom, Inc., New York (1943). Other lectures by Mark Van Doren and Dr. Robert M. Hutchins, among others, also included pertinent remarks on this subject; 7 Dewey, *My Pedagogic Creed* 6 (1929). (Although originally published in 1897 it was republished by the Progressive Education Assn. in 1929.)

> in those moral and intellectual disciplines which liberate men by cultivating their specially rational power to judge freely and to exercise free will * * * *"

It has never been regarded as sufficient that some educational facilities be afforded to some of the citizens of this country. All of our educators, sociologists, and parent-groups, have uniformly held that the sources and tools of learning be given to all citizens alike no matter to what group, sect, race, or color they belong. The strength of a democratic educational system rests not only in its universality, but in its freedom from arbitrary distinctions. The highest goal of a teacher in a democracy is to teach democracy. To permit racial segregation in American schools is to contradict the basic purpose for which the schools exist. In 1947 the Report of the President's Commission on Higher Education read:[10]

> "* * * the role of education in a democratic society is at once to insure equal liberty and equal opportunity to differing individuals and groups, and to enable the citizens to understand, appraise, and redirect forces, men, and events as these tend to strengthen or to weaken their liberties."

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[10] A Report of the President's Commission on Higher Education, *Higher Education for American Democracy*, Vol. 1, 5 (1947); also at page 5 see: "American society is a democracy: That is, its folkways and institutions, its arts and sciences and religions are based on the principles of equal freedom and equal rights for all its members, regardless of race, faith, sex, occupation, or economic status. The law of the land, providing equal justice for the poor as well as the rich, for the weak as well as the strong, is one instrument by which a democratic society establishes, maintains, and protects this equality among different persons and groups. The other instrument is education, which, as all the leaders in the making of democracy have pointed out again and again, is necessary to give effect to the equality prescribed by law."

The language of Mr. Justice FRANKFURTER in the case of *Illinois ex rel. McCollum* v. *Board of Education* similarly supports this proposition.[11]

Education is not only a component part of free democratic living, but is the very essence of and medium through which democracy can be effected. The intent of the framers of the Fourteenth Amendment was indicated in the 43rd Congress in 1874 by these words: "* * * that all classes should have the equal protection of American law and be protected in their inalienable rights, *those rights which grow out of the very nature of society, and the organic law of this country.*"[12] (Italics ours.)

c. These statements define the overall purposes and functions of education in a democratic society. On the professional level, the function of the state-supported law school enjoys an even greater significance. For it has been

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[11] *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203, 216, 217: "The sharp confinement of the public schools to secular education was a recognition of the need of a democratic society to educate its children, insofar as the State undertook to do so, in an atmosphere free from pressures in a realm in which pressures are most resisted and where conflicts are most easily and most bitterly engendered. Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects."

[12] 1 Cong. Globe, 43rd Congress (1874); Conant, "A Free Classless Society: Ideal of Illusion?": Address given at N. Y. HERALD TRIBUNE Forum on Current Problems, 1939; Printed in 42 Harvard Alumni Bulletin 245 (1939) with consent of Herald Tribune: The Bill of Rights and academic freedom go hand in hand. Dislike of governmental tyranny and hatred of restraints on man's intellectual power are close allies * * * If I am correct, what choice have those who teach our youth? None but to hope that the American ideal is not an illusion, that it is still valid; none but to labor unremittingly for a type of education which will every day quietly loosen the social strata; none but to believe that through the functioning of our schools and colleges American society will remain in essence classless and, by so doing, even in days of peril, preserve the heritage of the free."

said by legal scholars and sociologists that: "We are a nation that professes deep regard for the dignity of men and that in practice relies to an extraordinary degree upon the advice of professional lawyers in the formation and execution of policy." [13]

The late Chief Justice STONE described the law in terms of its sociological significance: [14]

> "Law performs its function adequately only when it is suited to the way of life of a people. With social change comes the imperative demand that law shall satisfy the needs which change has created, and so the problem, above all others, of jurisprudence in a modern world is the reconciliation of the demands, paradoxical and to some extent conflicting, that law shall at once have continuity with the past and adaptability to the present and future . . . We are coming to realize more completely that law is not an end, but a means to an end—the adequate control and protection of those interests, social and economic, which are the special concern of government and hence of law."

The objectives of the modern law school have been described as being four-fold in nature: (1) to prepare for public service; (2) to prepare for practice; (3) to prepare for law teaching; and (4) to prepare for legal research. [15]

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[13] Lasswell and McDougal, Legal Education and Public Policy: Professional Training in the Public Interest, 52 Yale L. J. 203, 291 (1943).

[14] Smith, *Harlan Fiske Stone: Teacher, Scholar and Dean*, 46 Col. L. Rev. 708 (1946); See also: Holmes, *The Use of Law Schools*, Collected Legal Papers 39-40 (1920) where Mr. Justice HOLMES said that the aim of the law school must be "not to make men smart, but to make them wise in their calling—to start them on a road which will lead them to the master."

[15] Boyer, *The Smaller Law Schools: Factors Affecting Their Methods and Objectives*, 20 Ore. L. Rev. 281 (1941).

It is the special duty of legal education to supply "our social mechanics and many, if not most of our social inventors".[16] From this source stem our main body of civic leaders, judges, legislators and other public servants. It is the law school which trains "policy makers for the even more complete achievement of the democratic values that constitute the professed ends of American policy".[17]

It is evident that the role of education in our society today is one of equipping our citizens with information and specific skills in order that they may productively enjoy the benefits of democracy. It is also evident that if we are to preserve our traditions of freedom, and if we are to compete successfully at home and abroad with other ideologies and philosophies, our people must above all be trained and enlightened.[18]

If an enlightened citizenry is a necessary factor in the equation of democracy, then it follows that education is an integral part of the democratic process. Assuming that education is merely a privilege, it is one of such a peculiar and precious nature that those entrusted with its administration have a compelling duty rather than mere discretionary power to see that no distinctions are made on the basis of race, creed or color. Unless Texas has some pur-

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[16] Simpson, *The Function of a University Law School*, 49 Harv. L. Rev. 1069 (1936).

[17] Lasswell and McDougal, *supra* note 13, at 206.

[18] The importance of education in terms of national welfare and national interest can be emphasized in another manner. The armed forces reported that in the critical June-July 1943 period, when the manpower needs for the armed services were at their peak, 34.5% of the Negro rejections were for educational deficiencies. American Teachers Assn. *The Black & White of Rejections for Military Service* 5 (1944).

pose other than these democratic objectives outlined above,[19] it must permit all persons without regard to class or race to participate in these benefits on an equal basis.

Racial separation, as it relates to a function as vital to the maintenance of democratic institutions as education, endangers devotion to the very ideals which education is supposed to instill. The segregated citizen cannot give full allegiance to a system of law and justice based on the proposition that "all men are created equal" when the community denies that equality by compelling his children

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[19] It may be that Texas has the same objective Mississippi has. The Mississippi Supreme Court in *Rice v. Gong Lum*, 139 Miss. 760, 104 So. 105, 108, described the segregation policy of the state as being required to preserve the purity and integrity of the white race and its social policy. "In our State no statute has defined the term 'colored race' and considering the policy of the State indicated above we think the Constitutional Convention used the word 'colored' in the broad sense rather than the restricted sense, its purpose being to provide schools for the white or Caucasion race, to which schools no other race could be admitted, carrying out the broad dominant purpose of preserving the purity and integrity of the white race and its social policy. (Marriage between Mongolian and whites and whites and Negro prohibited but not as between Negro and Mongolian.)

To all persons acquainted with the social conditions of this State and of the Southern States generally, it is well known that it is the earnest desire of the White Race to preserve its racial integrity and purity and to maintain the purity of the social relations as far as it can be done by law. It is known that the dominant purpose of the two sections of the Constitution of our State was to preserve the integrity and purity of the White Race. When the public school system was being created it was intended that the White Race should be separated from all other Races * * * Taking all of the provisions of the law together it is manifest that it is the policy of this State to have and maintain separate schools and other places of association for the Races so as to prevent race amalgamation. Race amalgamation has been frowned on by Southern Civilization always, and our People have always been of the opinion that it was better for all races to preserve their purity. However, the segregation laws have been so shaped as to show by their terms that it was the White Race that was intended to be separated from the other races."

(Footnote continued on p. 20)

to attend separate schools. Nor can a member of the dominant group fail to see that the community at large is daily violating the very principles in which he is being taught to believe.[20]

It is essential for the successful development of our country as a nation of free people that the understanding and tolerance which we wish practiced in later life be fostered in the classroom. A statement by Mr. Charles P. Sumner in 1849 has particular relevancy here.

> "And since according to our institutions, all classes meet, without distinction, in the performance of civil duties, so should they all meet, without distinction of color, in the school, beginning there those

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(Footnote continued from p. 19.)

Realistically, segregation is intended to maintain and foster a belief in white supremacy and Negro inferiority, as is so frankly inferred in the above quote from the Mississippi court. Another facet of this belief may be gleaned from the fact that in those states where the segregation of the races is required, it is libelous *per se*, and in most instances slanderous *per se*, to label a white man as a Negro. *Sportono* v. *Fourichon*, 40 La. Ann. 423, 4 So. 71 (slander); *Upton* v. *Times Democrat Publishing Co.*, 104 La. 141, 28 So. 970 (libel); *Collins* v. *Oklahoma State Hospital*, 76 Okla. 229, 184 P. 946 (libel); *Flood* v. *Evening Post Publishing Co.*, 71 S. C. 122, 50 S. E. 641 (libel); *Flood* v. *News and Courier Co.*, 71 S. C. 112, 50 S. E. 637 (slander); *Spencer* v. *Looney*, 116 Va. 767, 82 S. E. 745 (slander); *Morris* v. *State*, 109 Ark. 530, 160 S. W. 387 (slander). Cf. *Plessy* v. *Ferguson*, *supra* at 549; Contra: *Kenworthy* v. *Brown*, 92 N. Y. S. 34; see also *Davis* v. *Meyer*, 115 Nebr. 251, 212 N. W. 435.

If belief in inferiority of Negroes is the basis for Texas policy; or if segregation is founded upon racial malice or animosity, then unquestionably the legislative objection is unconstitutional. *Korematsu* v. *United States*, 323 U. S. 214.

[20] Many recent studies have pointed up the debilitating effect this conflict between ideals and practice causes in America. See particularly Myrdal, *An American Dilemma* (1944) passim and chap. 45 for the analysis of this conflict between ideals and practice. President's Committee on Civil Rights, To Secure These Rights (1947); Frazier, The Negro in the United States (1949).

> relations of equality which our Constitution and laws promise to all." [21]

Nor can it be argued that separation is a more effective and economical method of providing educational advantages. It is generally agreed that the duplication which segregation requires makes the maintenance of a dual system of education more expensive and in general lessens the quality of education which would be available to all under an unsegregated system.[22]

> "Segregation lessens the quality of education for the whites as well. To maintain two school systems side by side—duplicating even inadequately the buildings, equipment, and teaching personnel—means that neither can be of the quality that would be possible if all the available resources were devoted to one system, especially not when the States least able financially to support an adequate educational program for their youth are the very ones that are trying to carry a double load." [23]

The conclusion, therefore, that the use of race or color as a classification for the purpose of determining the availability of educational institutions bears no relation to the state's objective is inescapable.

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[21] *Argument of Charles Sumner, Esq., Against the Constitutionality of Colored Schools in the case of Sarah C. Roberts* v. *Boston*, 29-30 (1848).

[22] Even if it could be shown that dual system of education is economically sound, that would not make the practice constitutional.

[23] President's Commission on Higher Education, op. cit. *supra* note 10, Vol. I, at 31.

That even those who believe in segregation recognize it to be wasteful and inefficient can be gleaned from the fact that several southern states in an effort to maintain segregation and yet cut down on excessive duplication are now embarking on an attempt to pool their resources in the establishment of regional graduate and professional schools under a regional compact. See for discussion of this compact (Note), 13 Mo. L. Rev. 280 (1948).

2. *Racial segregation cannot be justified as essential to the preservation of peace and good order.*

All the available data with regard to the admission of Negroes on an integrated basis to public educational facilities of higher learning negates the argument that segregation is required to preserve peace and good order.

The experiences of states with a racial and social policy similar to that of Texas demonstrate that this policy may be abandoned at least at the graduate and professional school level to the advantage of all concerned. The University of Maryland has admitted Negroes into its law school since 1935. Negroes have freely attended the University of West Virginia since 1939. The University of Arkansas in 1947 admitted a Negro to its law school on a segregated basis. Before the term had ended, segregation had been eliminated and now Negroes are attending its law school and school of medicine just like any other students. The University of Delaware is now open to Negroes, as is the University of Kentucky. In September 1949, a Negro was admitted into the University of Texas School of Medicine.[24] In every instance there was considerable initial resistance by governmental officials to the abandonment of segregation. Yet all of these experiments have been beneficial and successful.

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[24] Both the University of Oklahoma and Oklahoma A. & M. College are now open to Negroes but on a segregated basis. For full discussion of the lowering of these barriers, see (Editorial Note), 16 *Journal of Negro Education* 4-6 (1949). See also: Thompson, *Separate But Not Equal. The Sweatt Case*, 33 Southwest Review 105, 111 (1948). Frazier, op. cit. *supra* note 20, chap. 17. There is evidence that a large segment of the southern teaching profession looks with favor on the abandonment of segregated schools. For an interesting article on this point see, Dombrowski, *Attitudes of Southern University Professors Toward the Elimination of Segregation in Graduate Schools in the South*, 19 The Journal of Negro Education 118 (1950).

Moreover, even assuming that the non-discriminatory treatment of petitioner by Texas, which the equal protection clause demands, will disturb public peace, the Court has consistently held that this is not a justification for the denial of constitutional rights to which one would otherwise be entitled.

In *Buchanan* v. *Warley*, 245 U. S. 60, the State of Kentucky attempted to defend an ordinance segregating whites and Negroes into separate residential areas on the ground that otherwise riots and disorder might result. That argument this Court dismissed with this statement:

> "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." (p. 81).

In *Shelley* v. *Kraemer*, 334 U. S. 1, this Court reaffirmed the principle that the preservation of public peace and good order does not suffice to clothe with constitutionality governmental action which effects a classification or distinction based upon race. See also: *Bridges* v. *California*, 314 U. S. 252; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Morgan* v. *Virginia*, 328 U. S. 373; *Thornhill* v. *Alabama*, 310 U. S. 88; *Whitney* v. *California*, *supra*.[25]

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[25] Cf. *Schneider* v. *State*, *supra*, at 161: "Mere legislative preferences or belief respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions."

3. *There is no rational basis for a legislative assumption that different races have different intellectual potentialities and should therefore be educated in separate schools.*

The practice of segregation has at times been rationalized by the claim that there are inherent differences between the races. This essentially racist view assumes that minorities belong to inferior races, and that racial intermixture results in the degeneracy of the superior race. After an exhaustive study of all scientific data referring to the intellectual capacity of different racial groups, an expert witness testified in the instant case to this effect:

> "The conclusion then, is that differences in intellectual capacity or in ability to learn have not been shown to exist as between Negroes and whites, and further, that the results make it very probable that if such differences are later shown to exist, they will not prove to be significant for any educational policy or practice" (R. 193-194).

One of the leading sociologists in the field of race relations has pointed out: "There is not one shred of scientific evidence for the belief that some races are biologically superior to others, even though large numbers of efforts have been made to find such evidence."[26] Thus there is no rational or factual support for the racist position. The racist premise is completely invalid, and no act of segregation based upon it can be upheld as reasonable.[27]

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[26] Rose, *America Divided: Minority Group Relations In the United States* (1948).

[27] Montague, *Man's Most Dangerous Myth—The Fallacy of Race*, 188 (1945); American Teachers Association, op. cit. *supra* note 18, at 29; Klineberg, *Negro Intelligence and Selective Migration* (1935); Peterson & Lanier, *Studies in the Comparative Abilities of Whites and Negroes*, Mental Measurement Monograph (1929); Clark, *Negro Children*, Educational Research Bulletin (1923); Klineberg, *Race Differences*, 343 (1935).

The fact that Texas singles out Negroes from all other racial groups [28] and directs that they alone shall be segregated, makes this practice even more arbitrary in nature. Cf. *Skinner* v. *Oklahoma*, *supra*. It should be noted in the same connection that the University of Texas Medical School has dropped its color barriers, for the time being at least. Thus, this Court should say of Texas' action what it said about Kentucky's action in *Buchanan* v. *Warley*, *supra*, at page 81:

> "It is the purpose of such enactments, and it is frankly avowed it will be their ultimate effect, to require by law, at least in residential districts, the compulsory separation of the races on account of color. Such action is said to be essential to the maintenance of the purity of the races, although it is to be noted in the ordinance under consideration that the employment of colored servants in white families is permitted, and nearby residences of colored persons not coming within the blocks, as defined in the ordinance, are not prohibited."

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[28] *Independent School District* v. *Salvatierra* (Tex. Civ. App.), 33 S. W. 2d 790; and *Minerva Delgado* v. *Bastro Independent School District* (decided on June 15, 1948 by United States District Ct. for W. Dist. of Texas) (not officially reported). It was held that school authorities could not segregate pupils of Mexican or other Latin-American descent into separate classes or schools. The basis for these decisions, although not specifically stated must be (1) that segregation by race is unconstitutional; (2) that the school authorities had no specific statutory authority to segregate a racial group unless such a policy as to that group is specifically enacted by the legislature. This was the basis of the decision in *Westminster School District* v. *Mendez*, 161 F. 2d 774 (C. C. A. 9th 1947); or (3) that Mexicans being of the white race could not be segregated under any circumstances.

Whatever the basis for these decisions, the result is that the law in Texas apparently is that Negroes are the only racial group which can be segregated.

4. *State ordained segregation is a particularly invidious policy which needlessly penalizes Negroes, demoralizes whites and tends to disrupt our democratic institutions.*

If the racial factor has no scientific basis, then the ills suffered as a result of racial segregation are particularly invidious. We have set out above the purposes and objectives of education. In light of those definitions, it is clear that segregation is an abortive factor in the full realization of its objectives and purposes.

a. First, segregation prevents both the Negro and white student from obtaining a full knowledge and understanding of the group from which he is separated (R. 194). It has been scientifically established that no child at birth possesses either an instinct or even a propensity towards feelings of prejudice or superiority. These prejudices, when and if they do appear, are but reflections of the attitudes and institutional ideas evidenced by the adults about him.[29] The very act of segregation tends to crystallize and perpetuate group isolation, and serves, therefore, as a breeding ground for unhealthy attitudes.[30]

Secondly, a feeling of distrust for the minority group is fostered in the community at large—a psychological at-

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[29] Park, *The Basis of Prejudice*, The American Negro, the Annals, Vol. 140, pages 11-20 as cited by Frazier, op. cit. *supra* note 20, at 668; Faris, *The Nature of Human Nature*, 354, chapter on *The Natural History of Race Prejudice* (1937).

[30] *Lasker, Race Attitudes in Children*, 48 (1949); Ware, *The Role of the Schools in Education for Racial Understanding*, 13 Journal of Negro Education (1944); Moton, *What the Negro Thinks* (1929); Long, *Psychogenic Hazards of Segregated Education of Negroes*, 4 The Journal of Negro Education, 343 (1935). For an exhaustive study relating to the reaction of Negroes to discrimination and how their reactions affect their relations with whites, see Rose, *The Negro's Morale: Group Identification and Protest*, passim (1949). Johnson, *Patterns of Segregation*, II, *Behavioral Response of Negroes to Segregation and Discrimination* (1943).

mosphere which is most unfavorable to the acquisition of a proper education (R. 195). This atmosphere, in turn, tends to accentuate imagined differences between Negroes and whites. In petitioner's trial in the lower court, an expert witness testified to the effect that "those (imagined) differences are given an appearance of reality by the formal act of separation".[31]

Qualified educators, social scientists, and other experts have expressed their realization of the fact that "separate" is irreconciliable with "equality".[32] There can be no equality since the very fact of segregation establishes a feeling of humiliation and deprivation to the group considered inferior.[33]

b. Probably the most irrevocable and deleterious effect of segregation upon the minority group is that it imposes

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[31] As stated by Myrdal, op. cit. *supra* note 20, at 625: "But they are isolated from the main body of whites, and mutual ignorance helps reinforce segregative attitudes and other forms of race prejudice."

[32] Id. at page 580; Johnson, op. cit. *supra* note 30, at 4, 318; Mangum, Jr., *The Legal Status of the Negro* (1947); Report of the President's Committee on Civil Rights, op. cit. *supra* note 20; Report of the President's Commission on Higher Education, op. cit. *supra* note 10; Deutscher and Chein, *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, 26 Journal of Psychology 259-287 (1948).

[33] McWilliams, *Race Discrimination and the Law*, 9 Science and Society No. 1 (1945); 56 Yale L. J. 1051, 1052, 1059 (1947); Bond, *Education of the Negro in the American Social Order* 385 (1934); Moton, op. cit. *supra* note 30, at 99; Bunche, *Education in Black and White*, 5 Journal of Negro Education 351 (1936); Long, op. cit. *supra* note 30, at 336-343; Henrich, *The Psychology of Suppressed People* 52 (1937); Dollard, *Caste and Color in a Southern Town* 269, 441 (1937); Young, *America's Minority Peoples* 585 (1932).

a badge of inferiority upon the segregated group.[34] This badge of inferior status is recognized not only by the minority group, but by society at large. As Myrdal has pointed out:

> "Segregation and discrimination have had material and moral effects on whites, too. Booker T. Washington's famous remark, that the white man could not hold the Negro in the gutter without getting in there himself, has been corroborated by many white Southern and Northern observers. Throughout this book we have been forced to notice the low economic, political, legal, and moral standards of Southern whites—kept low because of discrimination against Negroes and because of obsession with the Negro problem. Even the ambition of Southern whites is stifled partly because, without rising far, it is so easy to remain 'superior' to the held-down Negroes * * * "[35]

A definitive study of the scientific works of contemporary sociologists, historians and anthropologists conclusively documents the proposition that the intent and result of segregation are the establishment of an inferiority status. And a necessary corollary to the establishment of this value

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[34] Smythe, *The Concept of "Jim Crow"*, 27 Social Forces 48 (1948): "'Jim Crow' as used in a sociological context thus indicates for a specific social group the Negro's awareness of his badge of inequality which he learns through the operation of a 'Jim Crow' concept in his every day living. This pattern of existence has become so much a part of the nation's social structure that it has become synonymous with the words 'segregation' and 'discrimination', and at times when 'Jim Crow' is indexed some authors have indexed it as a cross reference for these terms."

[35] Myrdal, op cit. *supra* note 20, at 643.

judgment is the deprivation suffered by both the minority and majority groups.[36]

The lawyer, as has been demonstrated above, enjoys a peculiar and important role of leadership and guidance in the community. But a professional man who has received his legal education in a "separate" or "segregated" school must necessarily reflect the attitudes of and bear the psychological scars of the society which has arbitrarily placed upon

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[36] Baruch, *Glass House of Prejudice* 66-76 (1946); Gallagher, *American Caste and the Negro College* 94 (1938): Wherever possible, the caste line is to keep *all* Negroes below the level of the lowest whites. This is the first and deepest meaning of "separate but equal". Page 105: "Not the least important aspect of the caste system is its results in seriously malconditioning the individuals whose psychological growth is strongly affected by a caste divided society. These influences are not limited to the Negro caste. They stamp themselves upon the dominant caste as well"; LaFarge, *The Race Question and the Negro* 159 (1945): "Segregation, as a compulsory measure based on race, imputes essential inferiority to the segregated group. Segregation, since it creates a ghetto, brings in the majority of instances, for the segregated group, a diminished degree of participation in those matters which are ordinary human rights, such as proper housing, educational facilities, police protection, legal justice, employment. * * * Hence it works objective injustice. So normal is the result for the individual that the result is rightly termed inevitable for the group at large"; James, *The Philosophy of William James* 128 (1925): "Properly speaking, *a man has as many social selves as there are individuals who recognize him* and carry an image of him in their mind. To wound any one of these images is to wound him"; Loescher, *The Protestant Church and the Negro* (1948): "(Segregation) is, in itself, an implication of inferiority, an inferiority not only of status but of essence, of being"; Thompson, "Mis-Education for Americans": 36 Survey Graphic 119 (1947): "Education for segregation, if it is to be effective, must perpetuate beliefs which define the Negro's status as inferior, which emphasize superficial differences, or which in any way suggest that the Negro is a lower order of being and therefore should not be expected to be treated like a white person." Page 120: "Mis-education for segregation has deleterious effects on both Negroes and whites. It requires mental and emotional gymnastics on both sides to adjust (or attempt to adjust) to the many logical and ethical contradictions of segregation. The situation is crippling to the personalities of both Negro and white Americans."

him the onus of being "different"—a difference which carries with it the tacit taint of inferiority.[37] The effect upon the community-at-large as well as upon the Negro professional cannot fail to minimize and abort the value that such a person might have in the role of a lawyer and public servant.

c. There is no compensatory value to society as a result of the ills suffered from segregation. As we have pointed out above, segregation in education has produced deleterious effects upon both the majority and minority groups. We have similarly found that the only logical premise upon which segregation *could* be based—*i. e.*, the existence of differences in intellectual ability as between the races—has been completely discredited by scientific studies. It would appear then, that the only remaining rationale for segregation is that although it might be admitted that racial segregation has no validity, the prevailing customs and mores require that segregation be broken down in a gradual manner.[38] However, all available data which refers to instances where segregation *did* exist but was subsequently broken down, controvert this assumption.[39]

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[37] Meikeljohn, *Equality and Education*, radio address given over the Mutual Broadcasting System and published under the auspices of Education for Freedom, Inc. (1943). As Alexander Meikeljohn has said: "If government is carried on by consent of the governed, then every man is a governor * * * And as such, he and his fellow-rulers must be educated for their work as rulers. *But the crucial point is, that since they are all doing the same work, they must have the same education.*"

[38] See (Note), 46 Mich. L. Rev. 639 (1948).

[39] Warner, *New Haven Negroes*, 277 (1940); Blascoer, *Colored School Children in New York* 10 (1915); Thompson, op. cit. *supra* note 24; see also Thompson, *Some Progress in the Elimination of Discrimination in Higher Education in the United States*, 19 Journal of Negro Education 1-6 (1949). See testimony expert witnesses this case.

Since all available evidence controverts the theory that Negroes have an inferior mental capacity to whites, and moreover, since when permitted, the two groups work well together and to their mutual advantage, it must be concluded that any claim of inferiority is motivated solely by a desire to perpetuate segregation *per se*.[40]

It has been demonstrated, we submit, that Texas cannot show any rational relationship between racial segregation and the accomplishment of a legitimate legislative purpose. Therefore, its refusal to admit petitioner to the University of Texas has deprived him of the equal protection of the laws, under the broadest standard with which this Court measures compliance with that constitutional requirement.

B. Under the test applicable to governmental action based upon race and color a denial of admission to the University of Texas to petitioner is a clear and unwarranted deprivation of constitutional rights.

Respondents' action is unconstitutional for an additional reason. By making race and color the sole basis for its refusal to admit him to the University of Texas, Texas has rendered its activities subject to even stricter tests of constitutionality than would ordinarily be the case.

This stricter standard was foreshadowed by the statement of Mr. Justice STONE in *United States* v. *Carolene Products Co.*, 304 U. S. 144, note 4:

> "There may be narrower scope for operation of the presumption of constitutionality when legisla-

[40] McGovney, *Racial Residential Segregation by State Court Enforcement of Restrictive Agreement, Covenants or Conditions in Deed is Unconstitutional*, 33 Calif. L. Rev. 5, 27, note 94 (1945): "When a dominant race, whether white or Negro, demands separation, it is fallacious to say * * * that the intention and effect is not to impose a 'badge' of inferiority on the other."

tion appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth • • •

"Nor need we inquire whether similar considerations enter into the review of statutes directed at particular religions (citing cases), or national (citing cases), or racial minorities (citing cases); whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. (citing cases.)"

In subsequent cases this Court has established these suggestions as positive and definitive guides to decision. In *Hirabayashi* v. *United States*, 320 U. S. 81, 100, Mr. Chief Justice STONE said:

"Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."

Mr. Justice BLACK said in *Korematsu* v. *United States*, 323 U. S. 214, 216:

"All legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing

public necessity may sometimes justify the existence of such restrictions; racial antagonism never can."

Thus, at the very least, this Court requires a stronger showing of the *real difference* on which the classification rests, and a more pertinent relationship to the subject matter than is normally the case.[41]

In dealing with racial discrimination, it follows the same pattern which is used in dealing with interferences with liberties protected under the First Amendment. It does not abide by nor accept the judgment of the legislature but must determine for itself whether a violation of the constitutional

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[41] See: *Takahashi* v. *Fish & Game Commission*, 334 U. S. 410, 420; *Oyama* v. *California*, 332 U. S. 633, 640; *Shelley* v. *Kraemer*, 334 U. S. 1, 21, 23. See also: *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192 and *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210 which, although not directly in point, are links in the development of this principle.

It was on the basis of a national emergency that the Court upheld the relocation policy in *Hirabayashi* v. *United States*, *supra*, and in *Korematsu* v. *United States*, *supra*. But see: *Acheson* v. *Murakami*, 176 F. 2d 953 (C. C. A. 9th 1949). Although the major emphasis of opinion is on the hardship caused, the court implies rather sharply that the relocation policy was not required by any real danger of sabotage but resulted from the belief of General DeWitt in disloyalty by blood which it likened to the doctrines with which Nazis justified the gas chambers of Dachau. See particularly pages 957-958. Apparently, although when first presented with the problem in *Hirabayashi*, *supra*, and companion cases, the Ninth Circuit did not feel that it could look behind the stated military purpose, now with the war emergency past, it is ready to carefully examine and condemn a policy believed to be grounded on racial bias.

guarantee has occurred.[42] Whatever the stated purpose of respondents' action may be, this Court must consider all factors relevant to a determination of its actual and natural effect.[43] The effect here is to deprive petitioner of educational opportunities which white persons enjoy as a matter of course. This is that type of unequal treatment which the Fourteenth Amendment was designed to prevent.

Since Texas cannot justify this practice in terms of any overwhelming public necessity or emergency, we submit that here as in *Oyama* v. *California*, " * * * there is absent

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[42] It is sometimes said that where the governmental action is based upon race or color, there is a presumption of unconstitutionality. See: *Tussman & ten Brock*, op. cit. *supra* note 2; (Notes), 36 Col. L. Rev. 283 (1936), 40 Col. L. Rev. 531 (1940); 41 Yale L. J. (1931); Hamilton & Braden, *The Special Competence of the Supreme Court*, 50 Yale L. J. 1319, 1349-1357 (1941). This appears to be similar to the Court's placement of freedom of speech, press, assembly and religion in a preferred position. See, *e. g.*, *Marsh* v. *Alabama*, 326 U. S. 501, 508; *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639; but cf. Mr. Justice FRANKFURTER concurring in *Kovacs* v. *Cooper*, 336 U. S. 77, 89, 95; where he denies that any legislation is presumptively unconstitutional which affects rights protected under the First Amendment. It is his view that "those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements". Even under Mr. Justice FRANKFURTER's definition, however, such statutes would be lacking in the presumption of constitutionality which statutes have dealing with economic and social welfare problems. See: (Note) 49 Col. L. Rev. 629 (1949).

[43] See: *Bailey* v. *Alabama*, 219 U. S. 219, 244; *Oyama* v. *California*, *supra*; *Smith* v. *Texas*, 311 U. S. 128; *Pierre* v. *Louisiana*, 306 U. S. 354; *Norris* v. *Alabama*, 294 U. S. 587.

the compelling justification which would be needed to sustain discrimination of that nature."[44]

Thus, under both measurements, the state has subjected petitioner to an unconstitutional deprivation, and the judgment of the court below should be reversed.

C. The fact that states other than Texas require that racially segregated educational facilities be maintained should not influence this Court's interpretation of the equal protection clause.

1. The State of Texas may argue that the question presented here is a matter about which the legislative judgment of the state should be given great weight; that since there are a sizable number of states in which segregated educational facilities are required by law, the Court should not here attempt to impose its judgment as to the propriety of such a policy, on the state.[45] Respondents may also at-

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[44] *Supra*, at 640.

In *Kotch* v. *Bd. of River Port Pilot Commissioners*, *supra*, this Court approved nepotism as a method of handling the selection of pilots in Louisiana. However, the majority opinion made it clear that the peculiar history of piloting made it feel that there was a very real and valid connection between nepotism and the selection of good pilots, which was statute's objective. Mr. Justice RUTLEDGE dissented on the grounds that the selection was based upon blood, which he felt, regardless of its merits as a method, the Constitution condemned.

[45] Separate schools are required by the constitutional and/or statutory provisions of the following seventeen states:

Ala. Const., Art. XIV, Sec. 256, Ala Code, tit. 52, Sec. 93 (1940); Ark. Dig. Stat., Sec. 11535(c) (Pope, 1937); Del. Const., Art. X, Sec. 2, Del. Rev. Code, c. 71, Sec. 2631 (1935); Fla. Const., Art. XII, Sec. 12, Fla. Stat. Ann., Sec. 228.09 (1943); Ga. Const., Art. VIII, Sec. 1, Ga. Code Ann., tit. 32, Sec. 937 (Supp., 1947); Ky. Const., Sec. 187, Ky. Rev. Stat. Ann., Sec. 158.020 (Baldwin, 1943); La. Const., Art. XII, Sec. 4; Md. Code Ann., Art. 77, c. 18, Sec. 192 (Flack, 1939); Miss. Const., Art. VIII, Sec. 207, Miss. Code Ann., Sec. 6276 (1942); Mo. Const., Art. XI, Sec. 3, Mo.

(Footnote continued on p. 36.)

tempt to accomplish the same result by arguing that the problem presented here is similar to the exercise of the legislative judgment in enacting regulatory statutes to meet various economic problems, *e. g.*, *Nebbia* v. *New York*, 291 U. S. 502. It is submitted, however, that experiences of those states which require segregation in public schools are not relevant in determining whether petitioner's constitutional rights have been violated.

The prevailing opinion on the Court is that a claimed right is encompassed in the constitutional guarantee of due process of law if that right is fundamental to and implicit in our concept of liberty. See *Palko* v. *Connecticut*, 302 U. S. 319, 325; *Adamson* v. *California*, 332 U. S. 46. In determining whether there has been a deprivation of due process, the Court sometimes looks to the practices and experiences of the forty-eight states and of other jurisdictions, which have adopted Anglo-American jurisprudence, to see what view prevails as to the right being asserted. See, *e. g.*, *In re Oliver*, 333 U. S. 257. At times in consid-

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(Footnote continued from p. 35.)

Rev. Stat. Ann., Sec. 10349 (1943); N. C. Const., Art. IX, Sec. 2, N. C. Gen. Stat., Sec. 115-2 (1943); Okla. Const., Art. 1, Sec. 5, Okla. Stat., tit. 70, Sec. 455 (as amended Laws 1949, Art. 20, Sec. 9); S. C. Const., Art. XI, Sec. 7, S. C. Code, Sec. 5377 (1942); Tenn. Const., Art. XI, Sec. 12, Tenn. Code Ann., Sec. 2377 (Williams, 1934); Tex. Const., Art. VII, Sec. 7, Tex. Rev. Stat., tit. 49, art. 2900 (Vernon, 1942); Va. Conn., Art. IX, Sec. 140, Va. Code Ann., tit. 11, c. 33, Sec. 680 (1942); W. Va. Const., Art XII, Sec. 8, W. Va. Code Ann., Sec. 1775 (1949). Of this number, however, as indicated *ante*, Arkansas, Delaware, Kentucky, Maryland, West Virginia and Oklahoma have apparently abandoned this policy at the graduate and professional school level. Thompson, *supra* note 24. Whether their action means the permanent abandonment of segregation in graduate and professional schools cannot be predicted. Even Texas has admitted a Negro into the medical college of the state university, evidently as a special exception to the general practice of maintaining segregated schools. In the remaining thirty-one states Negroes are freely admitted into the state colleges, graduate and professional schools.

eration of this provision, the Court may point to the fact that other states have a rule contrary to the one, which petitioner claims is fundamental, as a basis for its refusal to interfere with the legislative judgment. See, *e. g.*, *Lincoln Federal Labor Union* v. *Northwestern Iron and Metal Company* (Mr. Justice FRANKFURTER's concurring opinion), 335 U. S. 525.

The Court has approached questions of due process of law in this manner because that concept is relatively fluid and vague, and because of a reluctance to confuse wisdom and desirability with considerations of constitutionality.

Here, however, no such problem is presented. This Court has stated that the due process clause of the Fifth Amendment forbids governmental action directed against a particular minority since governmental classifications based upon race and color are considered arbitrary. *Hirabayashi* v. *United States, supra*, see also *Korematsu* v. *United States, supra; Ex parte Endo*, 323 U. S. 283. In light of this interpretation, we submit that, even in the absence of an equal protection clause, respondents' action would be condemned.

2. Here, however, petitioner is relying upon the equal protection clause of the Fourteenth Amendment. In considering whether a person has been denied equal treatment, the basic inquiry is whether white persons are being afforded the same right, privilege or advantage which the state is denying to Negroes. If a particular state affords its white citizens a particular right or privilege, the equal protection clause requires that that right also be granted to Negro citizens on the same basis.[46]

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[46] Fairman & Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 Stanford L. Rev. 5, 138-139 (1949); see also: Brief of Committee of Law Teachers Against Segregation in Legal Education, as *amici curiae*, for discussion of intent of the framers of the 14th Amendment on this point.

The Court recognized this in *Strauder* v. *West Virginia*, 100 U. S. 303, 306-307. It said:

> "It [the equal protection clause of the 14th Amendment] was designed to assure to the colored race the enjoyment of all the civil rights that under the law [of the state wherein they reside] are enjoyed by white persons, and to give to that race the protection of the General Government, in that enjoyment, whenever it should be denied by the States * * *
>
> "* * * What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?"

Here the Court must determine for itself whether the governmental activity complained of results in discriminatory treatment in violation of the Constitution. And the fact that other states may be guilty of the same disregard of the constitutional mandate does not meet the problem.

3. It is further submitted that it would be improper to consider the practices of those states, which like Texas, enforce a pattern of racial segregation at the graduate and professional school level, in any event.

As previously stated, this Court has adopted the view that in economic matters, it has no special competence which would warrant the substitution of its view for that of the legislature. A necessary adjunct to this theory of loosely fettered legislation is that the legislators must be subject to political restraint. To this end it is necessary to have an electorate capable of exerting a corrective force, so that the lack of wisdom of the law makers may be dealt with

through the normal political processes. The belief of the Court is that as long as freedom of expression is not impaired, the electorate will be able to check legislative impropriety.[47] This is the basic reason for the care with which any impairment of freedom of speech is carefully scrutinized, *e. g., Thornhill* v. *Alabama*, 310 U. S. 88.

However, the Court also carefully scrutinizes threats to religious freedom, protected under the same constitutional provision; but on a different basis. Since minority sects or creeds might be incapable of exerting any real corrective force through normal political processes, the constitution protects them in the exercise of their religious beliefs to secure them against the possible hostility of the dominant majority. The equal protection clause was an extension of this constitutional protection to racial minorities. Recognition of this factor is implicit in recent decisions of this Court. *Oyama* v. *California, supra; Takahashi* v. *Fisk & Game Commission, supra; Shelley* v. *Kraemer, supra.*

4. Most of those states, which have traditions and practices similar to Texas in enforcing racial discrimination, refused in 1866 and 1867 to ratify the Fourteenth Amendment, because it was felt, and correctly, that the Amendment would require them to accord to Negroes the same rights accorded to white persons. Those states are Mississippi, Maryland, Kentucky, Texas, Arkansas, Georgia, Florida, North Carolina, South Carolina, Virginia and Delaware.[48]

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[47] Dowling, *Constitutional Law* (1946) explains the Court's philosophy thus:

> "The underlying theory of the court appears to be that if, by striking down interferences in respect to matters of the mind, it can keep the market place of ideas open and the polling booths accessible, it will rely upon the ordinary political processes to prevent abuse of power in the regulation of economic affairs."

[48] See: Fairman and Morrison, *supra* note 46, at 90-95.

5. These same states are among those involved in the long history of litigation before this Court, culminating in *Smith* v. *Allwright*, 321 U. S. 649, because of the relentlessness and recklessness with which they sought to circumvent the guarantees of the Fifteenth Amendment. In spite of the sweeping decision in *Smith* v. *Allwright, supra*, some of these states still hope to avoid bowing to the inevitable. See: *Rice* v. *Elmore*, 165 F. 2d 387 (C. C. A. 4th 1947), cert. denied, 333 U. S. 875; *Davis* v. *Schnell*, 81 F. Supp. 872 (S. D. Ala. 1949), cert. denied, 336 U. S. 993; *Baskin* v. *Brown*, 174 F. 2d 391 (C. C. A. 4th 1949).[49] The efforts of these states to avoid compliance with the Fifteenth Amendment is matched by their efforts to avoid adhering to the requirements of the equal protection clause, and the "separate but equal" doctrine is merely a part of this pattern.

6. Further segregation places barriers to free and democratic associations. Therefore, the segregated group is not able to readily influence that segment of the public which is not as vitally concerned with his immediate problem, as, for example, it was indicated that a labor union might be able to do with respect to legislation concerning the validity of the closed shop. See: Mr. Justice FRANKFURTER's opinion in *Lincoln Federal Labor Union* v. *Northwestern Iron and Metal Company, supra*. Racial isolation in fact strengthens and accentuates the evils which need to be combatted. Prejudice against racial minorities, as this Court has recognized, creates conditions which tend to discount those processes that ordinarily might be relied upon to protect individuals against arbitrary and unreason-

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[49] See: Key, *Southern Politics in the State and Nation* (1949) for a comprehensive analysis of the effect of *Smith* v. *Allwright*, on the white primary.

able governmental action. See: *United States* v. *Carolene Products Co., supra.*

Any argument that this Court should refuse to measure respondents' action in terms of the limitations of the equal protection clause, therefore, because states other than Texas practice racial discrimination, should be rejected. Respondents have deprived petitioner of the equal protection of the laws in violation of his constitutional rights. For these reasons, it is submitted, the judgment of the Court below should be reversed.

II.

The decision of the court below improperly applies the equal protection clause of the Fourteenth Amendment.

A. The Fourteenth Amendment was intended to protect Negroes against discriminatory state action.

Whatever dispute there may be as to the reach of the Fourteenth Amendment, all agree that one of its primary purposes was to raise the Negro to a status of equality and full citizenship,[50] and that the provision established a national interest in the maintenance of individual freedom from discrimination based upon race or color.[51]

Petitioner places his main reliance upon the equal protection clause. This provision, as we have stated previously, was intended to make certain that all persons similarly situated receive the same treatment, and particularly, that racial differences should not be the basis of governmental action. In this case, petitioner contends that he is

[50] *Strauder* v. *West Virginia, supra*; *Railway Mail Assn.* v. *Corsi*, 326 U. S. 88, 94.

[51] Lusky, *supra* note 6. See also: Marx, *Effects of International Tension on Liberty Under Law*, 48 Col. L. Rev. 555, 573 (1948).

being treated differently, and to his detriment, in being excluded from the University of Texas solely on account of his race.

B. Respondents contend that racial segregation in conformity to the requirements of the "separate but equal" doctrine affords equal protection.

Respondents contend that the constitution and statutes of Texas require the state to provide legal training for petitioner in a school separate and apart from that maintained for whites. They contend that the equal protection clause may properly be construed as permitting such an arrangement of the state's educational facilities, as long as the separate school is equal to the facilities maintained for whites. Moreover, respondents maintain that equality as between the two facilities need not be mathematically precise, but that the constitution is satisfied when the two facilities are "substantially equivalent".[52] Respondents

[52] This term "substantially equal" has lately been injected as a qualifying limitation of the "separate but equal" doctrine. It is difficult to perceive exactly what this qualification means. For one of the clearest and frankest definitions of the qualification see page 449 this record. There the Texas Court of Civil Appeals said:

> "'Equality' like all abstract nouns must be defined and construed according to the context or setting in which it is employed. Pure mathematics deals with abstract relations, predicated upon units of value which it defines or assumes as equal. Its equations are therefore exact. But in this sense there are no equations in nature; at least not demonstrably so. Equations in nature are manifestly only approximations (working hypothese); their accuracy depending upon a proper evaluation of their units or standards of value as applied to the subject matter involved and the objectives in view. It is in this sense that the decisions upholding the power of segregation in public schools as not violative of the fourteenth amendment, employ the expressions 'equal' and 'substantially equal' and as synonymous."

Evidently what is meant by "substantial equality" is that physical equality to the white school need only be approximated and appears to be an acceptance by the proponents of the "separate but equal" thesis of the inevitability of discrimination under a segregated system.

argue that this is what the Court sanctioned in *Plessy* v. *Ferguson, supra; Hall* v. *DeCuir,* 95 U. S. 485; *Cummings* v. *Board of Education,* 175 U. S. 528; *Chesapeake & Ohio Ry.* v. *Kentucky,* 179 U. S. 388; *Berea College* v. *Kentucky,* 211 U. S. 45; *Chiles* v. *Chesapeake & Ohio Ry.,* 218 U. S. 71; *McCabe* v. *A. T. & S. F. Ry. Co.,* 235 U. S. 151; *Gong Lum* v. *Rice,* 275 U. S. 78; *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337; *Sipuel* v. *Board of Regents,* 332 U. S. 631; *Fisher* v. *Hurst,* 333 U. S. 147; and that these cases compel affirmance of the judgment of the Court below. In short, respondents argue that these cases have established a principle whose authority has been unaffected by the Court's approach to the general problem of classification, and its more recent treatment of race and color as an irrational and constitutionally irrelevant criterion. In other words, respondents would substitute a judicially coined doctrine or phrase "separate but equal" used as an aid to the interpretation of an early case for the broad language of the Constitution itself:

> "No state shall * * * deny to any person * * * the equal protection of the laws"

in order to restrict the meaning of this provision.

Petitioner contends, on the other hand, that (1) the equal protection clause was carefully phrased in terms of its limitations on the power of state government so as to assure the equal treatment of individuals; (2) that the specific purpose of the Amendment was to prevent covert as well as open discrimination based upon race or color; and (3) that discrimination inevitably results wherever the "separate but equal" doctrine is applied.[53]

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[53] This will be fully discussed in Part III of the brief.

C. The problem with which *Plessy* v. *Ferguson* dealt is fundamentally different from the problem presented here, and that case cannot help this Court in making a proper determination of petitioner's complaint.

In *Plessy* v. *Ferguson*, a Louisiana statute, which required the separation of the races in railroad coach accommodations, was held to be a proper exercise of state authority under the Fourteenth Amendment as long as the facilities provided for Negroes were equal to those provided for whites. It is true that the Court cited several state cases condoning racial segregation in educational facilities, but the decision itself was necessarily limited to the problem before it.

Equality of transportational facilities presents an entirely different question from that of equality of educational opportunities, which is involved here. In transportation, the primary considerations are the type of comfort and convenience, courtesy, fare, speed, time of arrival and departure. In determining whether equality of opportunity has been offered in education, one must consider the learning process, the types of offerings provided, the necessity of education to the development of citizenship, loyalties and devotion to democratic beliefs, and the development of an individual as a personal and national asset; in short the whole function of education in a democracy. This necessarily requires consideration of psychological, sociological and spiritual factors in addition to pure physical measurements. Moreover, even as to transportation the application of *Plessy* v. *Ferguson*, has been considerably curtailed

by *Morgan* v. *Virginia, supra*, and *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28.[54]

It is to be remembered that *Plessy* v. *Ferguson* came to this Court for review of a judgment on a demurrer and that the sole question for consideration was a bare legal proposition as to the extent of state power. When that case was decided, this Court had had no experience in dealing with the type of question raised, and might have believed in all sincerity that assimilation of the Negro in American culture was impossible and that the experiment which the Fourteenth Amendment was launching was liable to end in tragic failure. Experience has since demonstrated that such fears were groundless, and that individual development is determined by opportunity and not by race. In addition, the Court had before it no facts to show that racial discrimination would be the natural result of the application of the "separate but equal" formula, and it presumed that no such discriminatory effect would result. There this Court said at 550, 551:

> "* * * so far, then, as a conflict with the 14th Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs, and the traditions of

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[54] We believe that the Court's decision in *Plessy* v. *Ferguson*, even as limited to the subject matter of transportation, was wrongly decided. The pernicious effect of that decision on transportation, as has been stated above, has been considerably curtailed by virtue of *Morgan* v. *Virginia, supra*, and *Bob-Lo Excursion Co.* v. *Michigan, supra*. It is our hope that decision by this Court in *Henderson* v. *United States*, now pending, this term No. 25, will overrule that case.

> the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable or more obnoxious to the 14th Amendment than the Acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislature."

The record in this case, on the other hand, conclusively shows that the separation of the races in Texas with regard to the availability of legal educational opportunities produces inequality of treatment and of opportunity, and that such inequality is a direct concomitant of this separation. Whatever may be the view as to the correctness of the decision in *Plessy* v. *Ferguson*, there are such intrinsic differences between the question dealt with there and those now being raised that it will be of little assistance in determining whether the equal protection clause requires Texas to admit petitioner to the School of Law of the University of Texas.

D. This is not an appropriate case for the application of the doctrine of *stare decisis*.

If *Plessy* v. *Ferguson*, and the other cases cited by respondents are definitive of the law presently applicable to this case, we would urge that they be discarded in light of changed conditions and of the necessity for different rules to meet new conditions. As Mr. Justice DOUGLAS said:

> "The fact is that security can only be achieved through constant change, through the wise discarding of old ideas that have outlived their usefulness,

and through the adapting of others to current facts." [55]

We submit, however, that the cases cited by respondents do not govern this case, and that, therefore, we do not need to meet the problem of the impact of the doctrine of *stare decisis* on the question raised herein.

A discussion of the cases on which respondents rely will demonstrate, we believe, that they have no pertinence to the instant problem.[56]

Cummings v. *Board of Education, supra,* is cited as adopting the "separate but equal" formula in the face of

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[55] Douglas, *Stare Decisis,* 49 Col. L. Rev. 735 (1949).

[56] In citing *Hall* v. *DeCuir, supra; Chesapeake & Ohio Ry. Co.* v. *Kentucky, supra; Chiles* v. *Chesapeake & Ohio Ry. Co., supra,* and *McCabe* v. *A. T. & S. F. Ry. Co., supra,* respondents have gone far afield. Those cases involve problems concerning the impact of state regulations upon the national interest in the free flow of commerce. *Hall* v. *DeCuir, supra,* struck down, as a burden upon commerce, a Louisiana statute requiring the equal treatment of the races by common carriers. Recently, however, in *Morgan* v. *Virginia, supra,* a Virginia statute which required the segregation of the races in interstate commerce was declared unconstitutional for the same reason. And cf. *Bob-Lo Excursion Co.* v. *Michigan, supra,* where the Court permitted the application of a state civil rights statute to a carrier operating in foreign commerce on the ground that although regulating foreign commerce, the activities involved were such a peculiar adjunct of local commerce as to require exceptional treatment. It was further suggested on page 37 that there could be no interference with national interest in the application of a state statute prohibiting racial discrimination since our national policy and policy of Canada were opposed to discrimination based on race. Hence *Hall* v. *DeCuir, supra; McCabe* v. *A. T. & S. F. Ry. Co., supra; Chesapeake & Ohio Ry. Co.* v. *Kentucky, supra;* and *Chiles* v. *Chesapeake & Ohio Ry. Co., supra,* have been stripped almost of any real significance whatsoever. The basic inquiry as to the *Chiles* case is whether it may still be considered as a precedent for authorizing common carriers to segregate the races in interstate commerce under their own private rules and regulations. That question undoubtedly will be decided this term in *Henderson* v. *United States, supra* note 54.

the fact that the Court specifically states that this problem was not before it.

> "It was said at the argument that the vice in the common-school system of Georgia was the requirement that the white and colored children of the state be educated in separate schools. But we need not consider that question in this case. No such issue was made in the pleadings. Indeed, the plaintiffs distinctly state that they have no objection to the tax in question so far as levied for the support of primary, intermediate, and grammar schools, in the management of which the rule as to the separation of the races is enforced. We must dispose of the case as it is presented by the record."[57]

Berea College v. Kentucky, supra, involved the constitutionality of a Kentucky statute which made it unlawful for any person or corporation to operate a school or college which received both Negroes and whites as pupils. This Court upheld the constitutionality of the statute but was careful to state that it was not considering the validity of its application to individuals.[58] Therefore, at most, this decision stands for the proposition that a state may prohibit corporations from accepting students of both races in the same institution without doing violence to the guarantees of the Fourteenth Amendment.[59] Even this proposition now seems questionable. At any rate, there is little doubt that a state may exercise greater power in its dealings with corporations than it is permitted in its relations with an individual.

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[57] At pages 543, 544.

[58] At page 54.

[59] In granting privileges and advantages which it may withhold a state may exact conditions which under ordinary circumstances it would be unable to do. See *Hamilton v. Board of Regents*, 293 U. S. 245.

In *Gong Lum v. Rice, supra*, a Chinese child was denied admission to a white school in her district. She contended that the state could not group her with Negroes for the purpose of determining what public school she could attend. No question was raised concerning the power of the state to adopt and enforce a racial classification.[60] The gravamen of plaintiff's contention was that, if whites had the authority and the power to protect themselves against contact with Negroes, who were regarded as peculiar and inferior beings, then Chinese should have the same privilege.

> "Of course it is the white, or Caucasian race, that makes the laws and construes and enforces them. It thinks that in order to protect itself against the infusion of the blood of other races its children must be kept in schools from which other races are excluded. The classification is made for the exclusive benefit of the law making race. * * *
>
> "If there is danger in the association [with Negroes], it is a danger from which one race is entitled to protection just the same as another. The White race may not legally expose the Yellow race to a danger that the dominant race recognizes and, by the same laws, guards itself against * * * "[61]
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> * * * * * * * *
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> "* * * The White race protects itself against conditions that would require social contact [with Negroes]. This, as the Mississippi courts say, to preserve the integrity of the Caucasian race. But has not the Chinese citizen the same right to protection that the Caucasian citizen has? * * * Can we arrogate to ourselves the superior right to so organize the public school system as to protect our racial integ-

[60] Brief of Plaintiff-in-Error filed here at page 14 concedes this authority.

[61] Id. at 9 and 10.

rity without regard to the interests or welfare of citizens of other races?" [62]

* * * * * * * *

"It appears, too, from the discussions in the cases and by the note writers that the courts have taken cognizance of the fact that the [Negro] is not desired as a social equal by the members of the White race, and, therefore, the White race has made its laws with a view to preventing such social contact as would have a tendency to foster social relations and social equality. But this same precaution, taken with respect to its own children, is omitted when it comes to dealing with the children of the other races." [63]

This Court felt that the question raised had been settled by *Plessy* v. *Ferguson*. In that we think it was in error. Mr. Chief Justice TAFT was of the opinion, apparently, that once plaintiff conceded that the state could classify on the basis of race, which petitioner denies in this case, there was no basis for the argument that it could not classify Chinese and Negroes together for the purpose of receiving public educational advantages. At any rate, *Gong Lum* v. *Rice*, cannot be a precedent for the application of the *Plessy* v. *Ferguson* formula in the field of education when that question was not before the Court.

In *Missouri ex rel. Gaines* v. *Canada, supra*, the question presented was whether the State of Missouri had denied to petitioner the equal protection of the laws in excluding him, because he was a Negro, from the only law school maintained by the state. That same question was initially presented to the court below in this case. Although the "sepa-

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[62] Id. at 13, 14.
[63] Id. at 17.

rate but equal doctrine" was mentioned, the Court held only that it was a denial of equal protection to provide educational advantages for whites and deny these advantages to Negroes. That decision is no authority for respondents' contention that the application of the "separate but equal" doctrine to a state's educational system complies with the requirements of the Fourteenth Amendment.

In *Sipuel* v. *Board of Regents, supra*, this Court decided that a state was under an obligation to afford to Negroes whatever educational advantages it offered whites and at the same time. In the argument here, counsel stated that the constitutionality of the state's segregation laws was not an issue in the case. For that reason when an original writ of mandamus was sought in the same case, *sub nom. Fisher* v. *Hurst, supra*, on the grounds that the setting up of a segregated school was a denial of equal protection, the Court refused to consider the question.

In none of the cases, therefore, on which respondents rely has the "separate but equal doctrine" been in fact applied to determine the reach of the equal protection clause in the relationship of a state to the individual. Moreover, in none of these cases has the doctrine been reexamined. There are no precedents, therefore, to which this Court must give weight which hold that the "separate but equal" doctrine is a valid measure of the individual's entitlement to equal treatment with respect to the educational advantages a state offers. Therefore, we are left only with *Plessy* v. *Ferguson*, which, as we have pointed out, did not involve educational facilities, as a precedent for the application of the "separate but equal doctrine" in determining the reach of state power under the limitations of the Fourteenth Amendment. And, it is submitted, that case is not applicable to this problem.

III.

If this Court considers *Plessy* v. *Ferguson* applicable here, that case should now be reexamined and overruled.

We have set out in a preceding section of this brief the reasons for our contention that *Plessy v. Ferguson* is not pertinent to the issues herein raised, and that decision may be reached here without its being considered. However, if the Court should be of a contrary opinion, then, we submit, *Plessy* v. *Ferguson* should be reexamined and overruled.

A. The *Plessy* v. *Ferguson* Court did not properly construe the intent of the framers of the Fourteenth Amendment.

1. *The Court improperly construed the Fourteenth Amendment as incorporating a doctrine antecedent to its passage and a doctrine which the Fourteenth Amendment had repudiated.*

In *Plessy* v. *Ferguson* the Court was required to interpret the recently adopted Fourteenth Amendment. In finding its intent and purpose a method was used which was both unusual and fallacious. A series of state cases, but chiefly *Roberts* v. *Boston*, 5 Cush. (Mass.) 198, were cited as sources for reading the "separate but equal" formula into the Fourteenth Amendment.[64] In that case, decided in 1849, prior to the adoption of the Fourteenth Amendment, a Negro girl contended that Boston authorities could not

[64] Other state cases cited include *People* v. *Gallagher*, 93 N. Y. 438; *Ward* v. *Flood*, 48 Cal. 36; *State, Garnes* v. *McCann*, 21 Ohio St. 210; *Lehew* v. *Brummell*, 103 Mo. 546; *Cory* v. *Carter*, 48 Ind. 337; *Dawson* v. *Lee*, 83 Ky. 49. It is interesting to note that all these states have now abolished segregation in public schools with the exception of Kentucky. Even there, however, Negroes are attending the graduate and professional schools of the University of Kentucky. See Thompson, *supra*, note 24.

require her to attend a segregated school.[65] The Supreme Court of Massachusetts held that her exclusion from the regular school did not violate any of her rights under the state constitution, since the city had made provision for her education at a separate school equal to the school maintained for whites. This case is the basic source for the finding in *Plessy* v. *Ferguson* that the Fourteenth Amendment condoned racial segregation on a "separate but equal" basis.

It should be remembered that when *Roberts* v. *Boston, supra,* was decided, it was believed that Negroes were inferior sub-human beings who could never be equal to whites, and Mr. Chief Justice TANEY in *Scott* v. *Sandford,* 19 How. 393, wrote that belief into the fundamental law.[66]

The Thirteenth, Fourteenth and Fifteenth Amendments repudiated the Dred Scott decision. These constitutional provisions were primarily intended to raise the Negro to a status equal to that of whites, to free and protect him from any stigma, degradation or discrimination which his race, color or previous condition of servitude might otherwise invite. *Strauder* v. *West Virginia, supra.* Yet in interpreting one of the constitutional provisions defining this new status, the *Plessy* v. *Ferguson* Court looked for its intent and meaning in a pre-Fourteenth Amendment philosophy—a philosophy which the new Amendment specifically repudiated.[67] Since these were new rights which had

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[65] Her attorney was Charles Sumner, later one of the persons chiefly responsible for drafting and steering through Congress the Thirteenth, Fourteenth and Fifteenth Amendments and Civil Rights Legislation passed thereunder.

[66] Historians credit this decision as one of the causes of the Civil War. See: Frazier, op. cit. *supra* note 20.

[67] See Cong. Globe, 42nd Cong., 2d Sess. 3261 (1872); Cong. Globe, 43rd Cong., 1st Sess. 4081, 4082, 4116 (1874).

been created, the intent of the framers of the Thirteenth, Fourteenth and Fifteenth Amendments should have been the primary sources for determining their meaning and purpose. Had this method been followed, modern scholars are of the opinion that the Court would necessarily have concluded that the "separate but equal" doctrine was directly contrary to objectives which the Fourteenth Amendment was mean to accomplish.[68]

2. *The framers of the Fourteenth Amendment and of the contemporaneous civil rights statutes expressly rejected the constitutional validity of the "separate but equal" doctrine.*

This Court often recognizes the pertinence and value of an analysis of the intent of the framers of constitutional and statutory law in aid of their interpretation and application.[69]

Accordingly, it is appropriate in reevaluating the "separate but equal" doctrine as enunciated in *Plessy* v. *Ferguson* to refer directly to the official statements of the men who were responsible for the drafting of the Fourteenth Amendment and the legislation passed shortly thereafter to implement it.

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[68] The brief on the merits of the Committee of Law Teachers Against Segregation in Legal Education filed as *amici curiae* in this case does a careful and comprehensive analysis of the question. It is their conclusion that the framers of the Fourteenth Amendment meant to prohibit segregation. *Tussman & ten Broek, supra* note 2, at 342, 356, *et seq.*, indicate that they have reached the same conclusion. See also: (Note), 49 Col. L. Rev. 629 (1949) to the same effect. Needless to say we believe that Mr. Justice HARLAN'S dissent in *Plessy* v. *Ferguson* was the correct approach to the question.

[69] See, *e. g., United States* v. *American Trucking Assn.*, 310 U. S. 534; *The Church of the Holy Trinity* v. *United States*, 143 U. S. 457. See also: Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Col. L. Rev. 527 (1947).

It became clear shortly after the ratification of the Thirteenth Amendment that it was too limited in scope to insure that the Negro would be able to achieve the equality and freedom from discrimination which were among its major purposes.[70] The Congress in 1866 set about combatting the so-called Black Codes enacted by the southern states, which limited the rights of Negroes to own property, institute law suits, testify in any proceedings, and imposed more severe penalties on Negroes than on whites for the same offenses. This legislative effort culminated in the Civil Rights Act of 1866, but in the process of its enactment the Congress became involved in a complicated semantical debate over the meaning of the term "civil rights". The bill itself emerged as a specific corrective only to certain named abuses and failed to resolve the general problems of equality and segregation.[71]

Eventually, it became apparent through the debates on the Civil Rights Act of 1866 that a new constitutional amendment was necessary to eliminate all "discrimination between citizens on account of race or color in civil rights".[72] To avoid the interpretative refinements of "civil rights" which had plagued the Congress, the more comprehensive "equal protection of the laws" was used as the key phrase for the statement of the basic principle.

Little can be found in the congressional debates relating to the Amendment itself which throws any light on the questions of interpretation here involved. The Amendment passed both houses easily. But the fifth section of the Amendment authorized implementary legislation, and by the time the Amendment was ratified new waves of discriminatory state legislation throughout the South required

[70] Flack, *The Adoption of the Fourteenth Amendment*, Ch. 1 (1908).

[71] Id., pages 21, 25, 29.

[72] Cong. Globe, 39th Cong., 1st Sess., 1290, 1293 (1866).

the 42nd Congress to face the task of shaping new practical statutory remedies. The extended debates of this Congress and of its successor, which finally carried through the passage of the Civil Rights Act of 1875,[73] are of great value in ascertaining the contemporary views and the "constitutional intent" of the men who drafted the Amendment.[74] The public statements of these men are particularly persuasive in respect to the "separate but equal" doctrine, for this question was clearly presented, extensively debated, and conclusively resolved in these hearings. If *Plessy* v. *Ferguson, supra*, is the foundation of the theory of civil rights which holds that a Negro is afforded the equal protection of the laws if he gets merely a technical, segregated "equality", then it is highly relevant here to go behind that decision in order to demonstrate that the men who were responsible for the Fourteenth Amendment and its accompanying legislation expressly rejected the theory and all of its implications.

The bill sponsored by Senator Sumner of Massachusetts was primarily concerned with the prohibition of discrimination in conveyances, inns, theatres and schools. By its language it was explicit that no segregation, no separation of these facilities was to be countenanced. It was pointed out many times that the bill did not permit the establishment of separate facilities even though they might be "equal".

Senator Sumner said:

> "Then comes the other excuse, which finds Equality in separation. Separate hotels, separate conveyances, separate theaters, separate schools, separate institutions of learning and science, separate churches, and separate cemeteries—these are the

[73] The bill passed the Senate on February 27, 1875, by a vote of 36 to 26, and was approved by the President on March 1st. See Flack, op. cit. *supra* note 70, at 277.

[74] See Fairman and Morrison, *supra* note 46.

artificial substitutes for Equality; and this is the contrivance by which a transcedent right, involving a transcendent duty, is evaded * * * Assuming what is most absurd to assume, and what is contradicted by all experience, that a substitute can be an equivalent, it is so in form only and not in reality. Every such attempt is an indignity to the colored race, instance with the spirit of Slavery, and this decides its character. It is Slavery in its last appearance."[75]

Senator Pease of Mississippi at a later date, shortly before the bill was passed in the 43rd Congress, states in unequivocal terms:

"The main objection that has been brought forward by the opponents of this bill is the objection growing out of mixed schools. * * * There has been a great revolution in public sentiment in the South during the last three or four years, and I believe that today a majority of the southern people are in favor of supporting, maintaining, and fostering a system of common education. * * * I believe that the people of the South so fully recognize this, that if this measure shall become a law, there is not a state south of the Mason and Dixon's line that will abolish its school system. * * * I say that whenever a state shall legislate that the races shall be separated, and that legislation is based upon color or race, there is a distinction made it is a distinction the intent of which is to foster a commitment of slavery and to degrade him. The colored man understands and appreciates his former condition; and when laws are passed that say that 'because you are a black man you shall have a separate school,' he looks upon that, and justly, as tending to degrade him. There is no equality in that.

" * * * because when this question is settled I want every college and every institution of learning in this broad land to be open to every citizen, that there shall be no discrimination."[76]

[75] Cong. Globe, 39th Cong., 1st Sess., 382, 383 (1865).
[76] Cong. Globe, 43rd Cong., 1st Session, page 4153 (1874).

In the course of these discussions of the "separate but equal" doctrine its proponents urged upon their colleagues various state court decisions which had followed it, viz., *Roberts* v. *Boston* and *State*, *Garnes* v. *McCann*, *supra*. These cases were expressly rejected as unsound and inconsistent within the meaning and purpose of the equal protection clause.[77] Yet these are the decisions which form the principal judicial foundation for this Court's decision in *Plessy* v. *Ferguson*.

By a vote of 26 to 21 the Senate of the 42nd Congress concluded that "separate but equal" schools, if established under the aegis of the state or by force of state law, were a violation of the Fourteenth Amendment. This judgment, since it came from the men who best knew why the Amendment was drafted and what they intended it to accomplish, should be highly persuasive. It should certainly cast doubt upon the soundness of the *Plessy* decision.

These Senators of 1874 and 1875 are among the most cogent and eloquent advocates of the petitioner's cause in this Court.[78] In rejecting the "separate but equal" theory,

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[77] See Cong. Globe, 42nd Cong., 2nd Sess. 3261 (1872); Cong. Globe, 43rd Cong., 1st Sess. 4081, 4082, 4116 (1874).

[78] This is what the Bill meant to Senator Howe of Wisconsin. Cong. Globe, 43rd Cong., 1st Sess. 4147 (1874):

> "* * * the simple justice of the provisions of this bill is self-evident.
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> "What are they? A command is proposed that no citizen of the United States shall be excluded from the accommodations of inns, of public highways, of public schools, nor shall their remains be excluded from resting in public burial grounds notwithstanding they are black. That is all. A national decree is proposed that a citizen shall have the right to travel along the public thoroughfares if he pays his fare, and shall have a right to send his children to the public schools if he meets the charges, although he is not white. That is all. It lays not an ounce of weight upon any man of color but it lifts burdens from some. That is the bill."

Senator Boutwell explained why the concept itself was a contradiction in terms, and a practical impossibility:

> "* * * To say, as is the construction placed upon so much of this bill as I propose to strike out, that equal facilities shall be given in different schools, is to rob your system of public instruction of that quality by which our people without regard to race or color, shall be assimilated in ideas, personal, poltical, and public, so that when they arrive at the period of manhood they shall act together upon public questions with ideas formed under the same influences and directed to the same general results; and therefore, I say, if it were possible, as in the large cities it is possible, to establish separate schools for black children and for white children, it is in the highest degree inexpedient to tolerate such schools. * * * And inasmuch as we have in this country 4,000,000 colored people, I assume that it is a public duty that they and the white people of the country with whom they are to be associated in public affairs shall be assimilated and made one in the fundamental idea of human equality. Therefore, where it would be possible to establish different schools, I am against it as a matter of public policy.
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> "But throughout the larger part of the South it is not possible to establish separate schools for black children and for white children, that will furnish means of education, suited to the wants of either class; and therefore in all that region of the country it is a necessity that the schools shall be mixed in order that they shall be of sufficient size to make them useful in the highest degree; and it is also important that they should be mixed schools, in order that the prejudice which now pervades portions of our people shall be uprooted by the power of general taxation."[79]

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[79] Cong. Rec. 4158, 43rd Cong., 1st Sess. (1874).

Senator Frelinghuysen searched the underlying principles of our government in replying to his opponents:

"If it be asked what is the objection to classification by race, separate schools for colored children, I reply, that question can best be answered by the person who proposes it asking himself what would be the objection in his mind of his children being excluded from the public schools that he was taxed to support on account of their supposed inferiority of race.

"The objection of such a law on our part is that it would be legislation in violation of the fundamental principles of the nation.

"The objection to the law in its effect on society if that 'a community is seldom more just than its laws;' and it would be perpetuating that lingering prejudice growing out of a race having been slaves which it is as much our duty to remove as it was to abolish slavery.

"Then, too, we know that if we establish separate schools for colored people, those schools will be inferior to those for the whites. The whites are and will be the dominant race and rule society. The value of the principle of equality in government is that thereby the strength insures to the benefit of the weak, the wealth of the rich to the relief of the poor, and the influence of the great to the protection of the lowly. It makes the fabric of society a unit, so that the humbler patrons cannot suffer without the more splendid parts being injured and defeated. This is protection to those who need it. And it is just that it should be so; for of what value is the wealth and talent and influence of the individual if you isolate him from society? Great as he may be, he is the debtor to society. Let him pay.

"Sir, if we did not intend to make the colored race full citizens, if we propose to place them under the ban of any legalized disability or inferiority, and

there to hold them, we should have left them slaves." [80]

One Senator prophesied that under the "pretense of what is called equality" the result would be to "grind out every means of education that the colored man can have". [81] This same fear was echoed by Mr. Justice HARLAN in his dissenting opinion in *Plessy* v. *Ferguson*. [82]

The provision with respect to schools was finally deleted from the bill in the House, but this was done as a matter of policy and political expediency. The House merely chose to withhold criminal sanctions with respect to the maintenance of segregated schools—it neither *approved* such segregation nor did it hold that separate schools were permissible under the Fourteenth Amendment. It merely left this aspect of segregation and discrimination to the courts.

For purely practical reasons some of the representatives felt that the Negro's chances of obtaining good common schools would be better under the Court's protection than under the proposed remedial legislation. [83] Unfortunately *Plessy* v. *Ferguson* infused the 14th Amendment with a meaning which was at odds with the intent of its framers. [84]

An historical analysis of the intent of those men of the 43rd Congress, who drafted and molded the enforcement acts of the Fourteenth Amendment, clearly indicates that the constitutional hypothesis of "separate but equal" as-

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[80] Id., at 3452.

[81] Cong. Rec. 4173, 43rd Cong., 1st Sess. Mr. Edwards of Vermont.

[82] *Plessy* v. *Ferguson*, *supra*, at 552.

[83] 3 Cong. Rec. 997-998, 43rd Cong., 2d Sess. (1875).

[84] Boudin, *Truth and Fiction About the Fourteenth Amendment*, 16 N. Y. U. L. Q. Rev. 16, 75 (1938); Buck, *The Road to Reunion* (1937).

established in *Plessy* v. *Ferguson*, should not be extended to the field of education—particularly at its most vulnerable point—the professional level. We submit, therefore, that it should be overruled.

B. Even comparative physical equality is not possible under a system of enforced segregation.

This Court has never held, as respondents infer, that there is an irrebuttable presumption of validity to segregation statutes. On the contrary, as we have already shown, this Court declared that governmental action which results in discrimination based upon race and color is violative of Constitutional guarantees in the absence of some overwhelming public necessity, *Oyama* v. *California*, *supra*. This record is replete with evidence disclosing the discriminatory consequences of the application of the "separate but equal" doctrine. Where the treatment accorded petitioner is admittedly inferior to and different from that accorded to other persons similarly situated, equality of such treatment can not be assumed, but must be affirmatively determined.

In the seventeen states—Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, West Virginia and the District of Columbia—where segregation is practiced, it is a matter of public knowledge that the Negro schools are not equal to the white schools. This fact has been graphically demonstrated in the appendix to our petition and brief for writ of certiorari.

But a word in summary needs to be said at this time. In those states there are 39 publicly supported institutions devoted to the higher education of the Negro; while there are 192 public colleges and universities for whites. Negroes

are approximately 22.3 per cent of the total southern population, but they have 16.9 per cent of the total number of public institutions and comprise only 10.3 per cent of those benefiting by the existence of such schools. Only 5.5 per cent of all expenditures for public institutions in the South were for Negro colleges and universities.[85]

Southern Negroes constitute 7.7 per cent of the total population of the United States; southern whites 26.7 per cent. The South spends 22.3 per cent of the total national sum spent for institutions of higher learning. Negroes get 1.8 per cent of this amount, whereas whites receive 20.5 per cent. Per capita expenditure for whites is $4.28; while that for Negroes is $1.32.[86] If expenditures were equalized on a per capita basis, $19,000,000 more per year would be required in higher education alone.

Whereas 16 per cent of all white public intsitutions are accredited by the Association of American Universities,

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[85] See Hearings Before Subcommittee on Appropriations, House of Representatives, 80th Congress, February, 1947, for testimony of Dr. Mordecai W. Johnson, President of Howard University, where he said: "In states which maintain the segregated system of education there are about $137,000,000 annually spent on higher education. Of this sum $126,541,795 (including $86,000,000 of public funds) is spent on institutions for white youth only; from these institutions Negroes are rigidly excluded. Only $10,500,000 touches Negroes in any way; in fact, as far as state supported schools are concerned, less than $5,000,000 directly touches Negroes * * * The amount of money spent on higher education by the state and federal government for Negroes within these states is less than the budget of the University of Louisiana (in fact only sixty-five per cent of the budget) which is maintained for a little over 1,000,000 people in Louisiana. That is one index; but the most serious index is this: that this little money is spread over so wide an area and in such a way that in no one of these states is there anything approaching a first-class university opportunity available to Negroes."

[86] The Educational Directory, 1946-47, Vol. III, page 7. 16th Census: 1940, Population, 2nd Series, U. S. Summary, page 47. *The Journal of Negro Education*, Summer, 1947, page 408. U. S. Office of Education, Statistics of Higher Education, 1943-44, page 70.

only 5.1 per cent of all Negro public institutions are similarly accredited. Of all white public institutions, 25.6 per cent are accredited only by state departments of education while 33.3 per cent of the Negro institutions are similarly accredited.[87] There are 18 law schools, 15 medical schools, 5 colleges of dentistry, 26 schools of engineering, and 13 schools of pharmacy for whites which are accredited. Except for the schools and colleges of Howard University, which is federally supported, there is not one Negro publicly supported graduate or professional school in the country which has received full accreditation.[88]

"Whatever other inferences may be drawn from the facts * * * one of the most important and inevitable conclusions is that Negroes in the separate school systems of the states which require racial segregation have been the victims of gross discrimination in the provision of educational opportunities * * *."[89] The evidence is conclusive that at the graduate and professional school level, there is absolutely no comparative physical equality between the institutions available for whites and those for Negroes.[90] Whatever virtues the "separate but equal" doctrine may

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[87] The Educational Directory, 1946-7.

[88] The Accrediting Agencies: Law—The American Bar Association; Medicine—The American Medical Association; Dentistry—The Council of Dental Education of the American Dental Association; Engineering—The Engineers Council for Professional Development; Pharmacy—The American Council on Pharmaceutical Education, Inc. The states included in this listing are: Alabama, Arkansas, Delaware, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia and West Virginia. The Law School for Negroes of Lincoln University, Missouri, has been provisionally accredited by the American Bar Association.

[89] Thompson, 16 *The Journal of Negro Education*, 265 (1947).

[90] A Report of Elmo Roper for the Committee on a Study of Discriminations in College Admissions, *Factors Affecting the Admission of High School Seniors to College* (1949)—a comprehensive study showing the extent of discrimination in college admissions.

have in theory, in application it has inevitably resulted in discriminatory treatment. As such that doctrine denies the equal protection of the laws. *Yick Wo* v. *Hopkins*, 118 U. S. 356.

These facts lead to the conclusion that equality, within the meaning of the Fourteenth Amendment, can never be realized under a system of segregation. As one eminent authority, Dr. Alain Locke, stated:

> "In the first place few if any communities can afford the additional expense of entirely equal accommodations, and it would require as much and the same kind of effort as the removal of the social bias of the community and the reform of its conscience to secure general admission of the principle of complete equity as to secure the abolition of the dual system. Up to a certain point, communities will pay a price for prejudice, but not such an exhorbitant price as complete economic equality requires. Assuming that such parity could be reached and consistently maintained, the moral damage of the situation of discrimination would still render the situation intolerable. But the argument can and will doubtless be settled or fought out on the practical plane of the school budget. Whenever the standards of Negro public schools are raised to the point that the budget expense approaches parity, there will be less resistance to educational segregation, for one of the main but concealed reasons for discrimination lodges in the idea that the Negro is not entitled to the same educational facilities as the white community." [91]

In actuality, states operating under the "separate but equal" doctrine have always attempted to prevent this Court from reviewing its consequences. See *Missouri ex rel.*

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[91] Locke, "Dilemma of Segregation", 4 *Journal of Negro Education*, 407-409.

Gaines v. *Canada*, and *Sipuel* v. *Board of Regents*; See also Brief of respondents in opposition to petition for certiorari. In addition, the doctrine has been misconstrued as raising a procedural barrier to test the constitutionality of separate schools (R. 445). The records in the cases eventually reviewed here have uniformly disclosed a total disregard of even the minimum requirements of the "separate but equal" doctrine. See *Gaines* case and *Sipuel* case, *supra*.[92]

In all cases where the Court has been presented with facts which purported to demonstrate that equality had been achieved in the spacial separation of the races, the Court has declared that the equal protection clause has been violated. *Buchanan* v. *Warley*, *supra*; *Shelley* v. *Kraemer*, *supra*.

Since *Plessy* v. *Ferguson*, we have fought two World Wars for the preservation and maintenance of democracy, and have become a signatory of the United Nations Charter which provides that there shall be no discrimination based on race, creed or color.[93] This Court now recognizes and accepts as one of its primary responsibilities—the protection of minority groups against governmental discrimination based upon considerations of race or color. *Hirabayashi* v. *United States*; *Shelley* v. *Kraemer*; *Takahashi* v. *Fish and Game Commission*; *Oyama* v. *California*.

Whatever reasons may have caused the Court to adopt the "separate but equal" formula in *Plessy* v. *Ferguson*, the whole history of its application conclusively proves that

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[92] In neither the *Gaines* case nor the *Sipuel* case was there any provision at all made for the legal education of Negroes, even in a segregated institution, until the decision by this Court. In this case, although respondents have relied upon the "separate but equal" doctrine *ab initio*, no efforts were made to offer petitioner any type of legal facilities until almost two years after the institution of this action.

[93] Articles 55 and 56.

it has not, does not and cannot provide the equal protection which the 14th Amendment sought to secure.

The fact that physical equality has not resulted, when the "separate but equal" doctrine has been applied, is no accident. Segregation is grounded in a belief in Negro inferiority. Recognizing this fact, social science experts are in universal agreement that segregation and racial discrimination are necessarily one and the same.

IV.

This record discloses the inevitability of discrimination under the "separate but equal" formula.

A. Negro and white college and graduate school facilities in Texas.

Dr. Charles H. Thompson, an authority in education whose unexcelled qualifications as an expert witness are amply set forth in the record (R. 229-233), made a documented, scientific study of the comparative educational facilities for Negroes and whites in Texas at petitioner's request (R. 233-4). Analyzing the situation on the basis of the best recognized criteria, Dr. Thompson found, in substance, as follows:

1. *Physical Facilities.*

The combined asset value of the plant facilities of the thirteen white state-supported schools above the high school level was in excess of $72,000,000; that of Prairie View, the only Negro school of "higher learning", was slightly more than $4,000,000 (R. 239 and 241). This is less than half of the proportionate amount which would be allocated on the basis of the Negro population of the state. Although we believe such a standard to be as pernicious as the "sepa-

rate but equal" doctrine itself, it would seem that this at least would be the minimum requirement of the doctrine. On a per capita basis, $28.66 was invested in plant assets for every white person; $6.40 for every Negro (R. 241). The per student appropriation at Prairie View is much less than that found to exist at a small white teachers college (R. 249). Texas provided through state-supported four-year institutions for 66.8 per cent of its white college students, but for only 31.8 per cent of the Negro students (R. 252).

2. *Current Expenditures.*

In 1943-44, $11,071,490 in state, county and district funds was appropriated for higher education in Texas. The amount of $10,858,018 was appropriated to white institutions, *i. e.*, $1.98 per capita to every white citizen. The sum of $213,472 was appropriated to Negro schools, or 23 cents per capita. The white institutions thus received 8.06 times more funds than were allocated to the Negro institutions (R. 246).

3. *Curriculum.*

In Texas there are 106 undergraduate fields of specialization in the white state-supported institutions, and only 49 in the Negro institution, Prairie View (R. 255). Texas A. & M., a white state-supported institution, has 45 departments of specialization as compared with 13 at Prairie View, a ratio of more than 3 to 1. On the other hand, a number of trade courses on the high school level are given at the Negro university, Prairie View, such as mattress making, auto mechanics, carpeting, laundering, and dry cleaning (R. 255). These skills are usually taught in high schools or vocational schools of secondary school rank (R. 356). On the graduate level, the investigation reveals that a total of

159 Negroes received graduate degrees during approximately a five-year period, as contrasted with some 3,000 white students (R. 257). Moreover, the range of subjects in white graduate schools is considerably wider (R. 257). Dr. Thompson stated:

> "The National Survey of Higher Education for Negroes, to which I have referred, a U. S. Office [of Education] publication, indicated in 1942 that the Texas state supported higher institutions for whites offered graduate work in 65 fields and 5 for Negroes" (R. 257).

The University of Texas, at the present time, gives ten different types of graduate degrees in forty fields. Prairie View gives a Master's Degree in thirteen fields (R. 257). White institutions gave 212 doctorates (R. 258). No Negro institution is qualified to give any degrees at this level.

4. *Faculty.*

In comparing the faculty of white and Negro schools of higher learning in Texas, Dr. Thompson stated that two key factors must be considered, namely, salary and training (R. 261). In order to attract and retain a good teaching staff, faculty members must be paid good salaries and find the working conditions satisfactory. Dr. Thompson's study disclosed that twenty-five teachers were lost to other institutions within the past five years because of the inability of Prairie View to match their salary offers (R. 262). It further revealed that the median salary of a full professor at Prairie View is $2,025, while the lowest salary paid to a full professor in a state-supported white college is $2,700 (R. 262).

As to training, the picture is the same. In 1945-46, only 9.3 per cent of the faculty members of Prairie View had degrees on the doctorate level (R. 263).

5. *Library.*

The University of Texas Library had 750,974 titles. Prairie View had 25,000. Even a white college, such as East State Teachers College with a smaller student body (1,205 students as compared to Prairie View's 1,619), had 81,974 volumes in 1945-46 (R. 264). The library of the Negro College was found by an impartial survey committee to be inadequate even for undergraduates, not to speak of its complete inability to meet the needs of graduate students (R. 265).

6. *Standing in the educational world and community.*

Prairie View is not accredited by The Association of American Universities nor by any of the national professional councils (R. 266). It is regarded as a "poor college"; it is not a "real university" (R. 267). Three white state institutions are accredited by The Association of American Universities (R. 266).

A Negro student at Prairie View cannot get the type of undergraduate or graduate education that is available to the white student of the state. Since this case was started, Texas has established at Houston the University for Negroes. The disparities which Dr. Thompson's study revealed may not now be accurate as to specific detail. It is submitted, however, that the picture remains the same although its contours may have varied somewhat.

In the face of these facts Texas cannot now be heard to say that it has provided "separate but equal" college and graduate school facilities for Negroes. Even the testimony for respondents concedes this to be true.

Dean Pettinger, a witness for respondents who has studied educational facilities for Negro and white students

in Texas for thirty years, stated: "I am unable to think for the moment of [any] colored institutions and white institutions which do have equal facilities with which I have been associated" (R. 333).

B. The two law schools compared.

The picture at the law school level is no brighter. When petitioner applied for a legal education the only law school in existence maintained by the State of Texas was the one at the University of Texas (R. 425).

The University of Texas has been in existence since the last century. The law school has been in existence for more than fifty years and is recognized and accredited by every association in the field (R. 90-91). The Negro school had just been opened in March, 1947 and was not accredited by any agency (R. 25, 96).

1. *Physical plant.*

The proposed Negro law school was to be set up in the basement [94] of a building in downtown Austin consisting of three rooms of moderate size, one small room and toilet facilities (R. 36). There were no private offices for either the members of the faculty or the dean. The space for this law school had been leased for a period from March to August 31, 1947 at $125 a month, and the authorities were negotiating for a new lease after that period (R. 41). It was freely admitted that "there is no fair comparison in monetary value" between the two schools (R. 43). There was no assurance as to where the proposed law school would be located after August 31st, and it was not even certain as to what city it would be in after August 31st (R. 52-53).

[94] Pictures of the building of the Law School at the University of Texas and the basement quarters of the so-called Negro Law School appear in the record at pages 385-387 and 389.

2. *Library.*

While the law school at the University of Texas had a well-rounded library of some 65,000 volumes (R. 133), the proposed Negro school had only a few books, mostly case books for use of first-year students (R. 21-22). However, the students at the proposed law school for Negroes had access only to the law library in the state capitol directly across the street, a right in common with all other citizens of the State of Texas (R. 45). A library of approximately 10,000 volumes had been requisitioned on February 25, 1947 (R. 40), but was not available for use at the time of the trial of this case (R. 44). The University of Texas law school had a full-time, qualified and recognized law librarian with two assistants (R. 139). The Negro law school had neither librarian nor assistant librarians (R. 74, 80, 128).

It was admitted that the library at the state capitol, a typical court library and not a teaching library, was not equal to the one at the University of Texas, and did not meet the standards of the Association of American Law Schools (R. 134, 138, 145). It was also admitted that even if the requisitioned books were actually obtained the library would not then be equal to the library already in existence at the law school of the University of Texas (R. 151).

3. *Faculty.*

The University of Texas Law School has a faculty consisting of sixteen full-time and three part-time professors (R. 369-371). The proposed faculty for the Negro school was to consist of three professors from the University of Texas who were to teach classes at the Negro school in addition to their regular schedule at the University of Texas (R. 59, 84, 87).[25] The comparative value in the difference be-

[25] It was also shown that offices for the dean and faculty members involved were to remain at the University of Texas (R. 46-47).

tween full-time and part-time law school professors was freely acknowledged, and it was admitted that the proposed "faculty" did not meet the standards of the Association of American Law Schools (R. 59, 91-92).

4. *Student body.*

There were approximately eight hundred fifty students at the law school of the University of Texas (R. 76). From the record it appears that all qualified students other than Negroes were admitted. There were no students at the proposed Negro school at the date of opening nor at the time of the trial (R. 162). Although several Negroes had made inquiry concerning the school, none had applied for admission (R. 162). If petitioner had entered this school he would have been the only student.

The law school of the University of Texas had a moot court, legal aid clinic, law review, a chapter of Order of the Coif, and a scholarship fund (R. 102-105). None of these were present or possible in the proposed Negro law school, and Charles T. McCormick, dean of the two law schools, testified that he did not consider these to be factors material to a legal education but rather, that they were "extraneous matters" (R. 106).

Thus Texas has provided all the facilities at the University of Texas which are essential to achieving the objectives of a modern law school, and the Negro law school can in no way be said to be equal or substantially equal to this school.

When we examine the concept "equally" semantically, we find that it is a purely relative term. One cannot compare a state-supported law school, whose student body is composed solely of Negroes, to a state-supported law school whose student body includes various groups (with the ex-

ception of Negroes)—whose study of the law is benefitted by a mutual interchange of ideas and attitudes. Even if, for the sake of argument, the physical facilities offered at both schools *were* the same, "not even the most mathematically precise equality of segregated institutions can properly be considered equality under the law".[96]

It is no accident, no coincidence, that whenever segregation is decreed and enforced, you will find inequality. The facts are, as we have indicated, that in the state of Texas as well as in the other 16 states and the District of Columbia, discrimination and inequality in education, follow inevitably and inexorably from the mere fact of segregation. We have demonstrated above that the psychological effects of a segregated professional education are harmful to the segregator and segregatee alike, because in addition to the inferior educational opportunities offered at the "separate" school—the very fact of separation lessens their value or "social location".

In regard to the measurable physical aspects of professional education, the record has shown that gross inequalities exist whenever segregation is practiced. Similarly, social scientists have attested to the psychological and social ills which result from enforced racial segregation.[97] The results of authoritative studies prepared by educators, psychologists, legal scholars and social scientists are all in agreement with petitioner's contentions that *there can be no separate equality.*

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[96] Report of the President's Committee on Civil Rights, *To Secure These Rights* 82 (1947).

[97] For an exhaustive study of a cross-section of veterans living in a large American city with regard to how environmental factors are associated with hostility towards minority groups see: Bettleheim and Janowitz, *Dynamics of Prejudice*, A Psychological and Sociological Study of Veterans (1950) passim.

Conclusion

Historically, the prevailing ideology of our democracy has been one of complete equality. The basic law of our land, as crystallized in our Constitution, rejects any distinctions made by government on the basis of race, creed, or color. This concept of true equality has become synonymous with what is generally defined as "the American Creed". Moreover, this creed has become a symbol of hope for people everywhere.

In petitioner's state of Texas, the educational facilities available to him are governed by the "separate but equal" doctrine. He is asked to believe, in spite of the overwhelming evidence to the contrary, that he can secure "equal" educational opportunities in a school set apart from his fellow citizens. For him, the American Creed is but an attractive idea—not a reality.

Education is not a passive concept. The acquisition of information and special skills, transmitted through the medium of education, enables a citizen to live intelligently as well as productively. To the extent that petitioner is in any way denied the same educational facilities available to other citizens of his state, both he and his fellow citizens are limited in their opportunity to fully participate in our democratic way of life. Petitioner contends that a complete and proper education cannot be attained under the "separate but equal" doctrine of *Plessy* v. *Ferguson*.

WHEREFORE, it is respectfully submitted that the judgment of the Court below should be reversed.

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